National Defence Défense nationale

A review from 1 April 2004 to 31 March 2005

# ANNUAL REPORT

## of the Judge Advocate General to the Minister of National Defence on the administration of military justice in the Canadian Forces

FIAT JUSTITIA
Office of the Judge Advocate General
Cabinet du juge-avocat général

Canada

National Defence
Défense nationale

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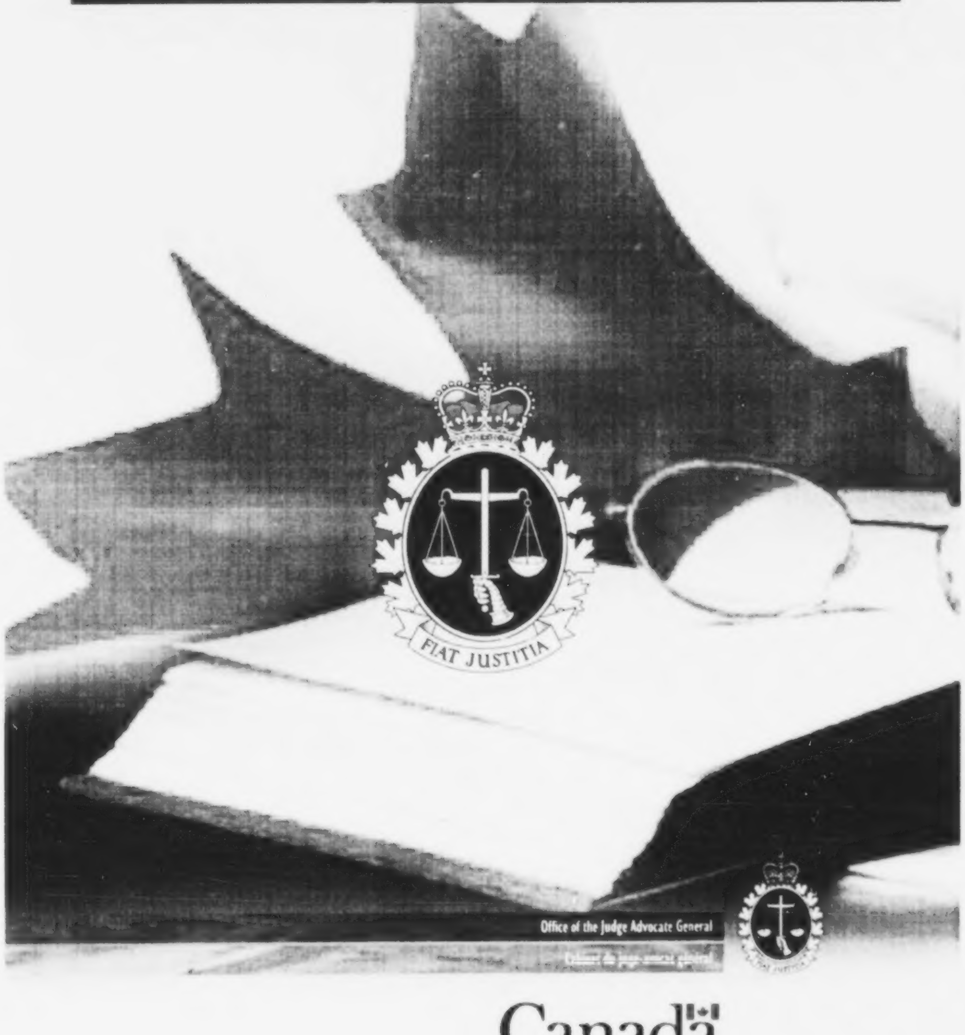
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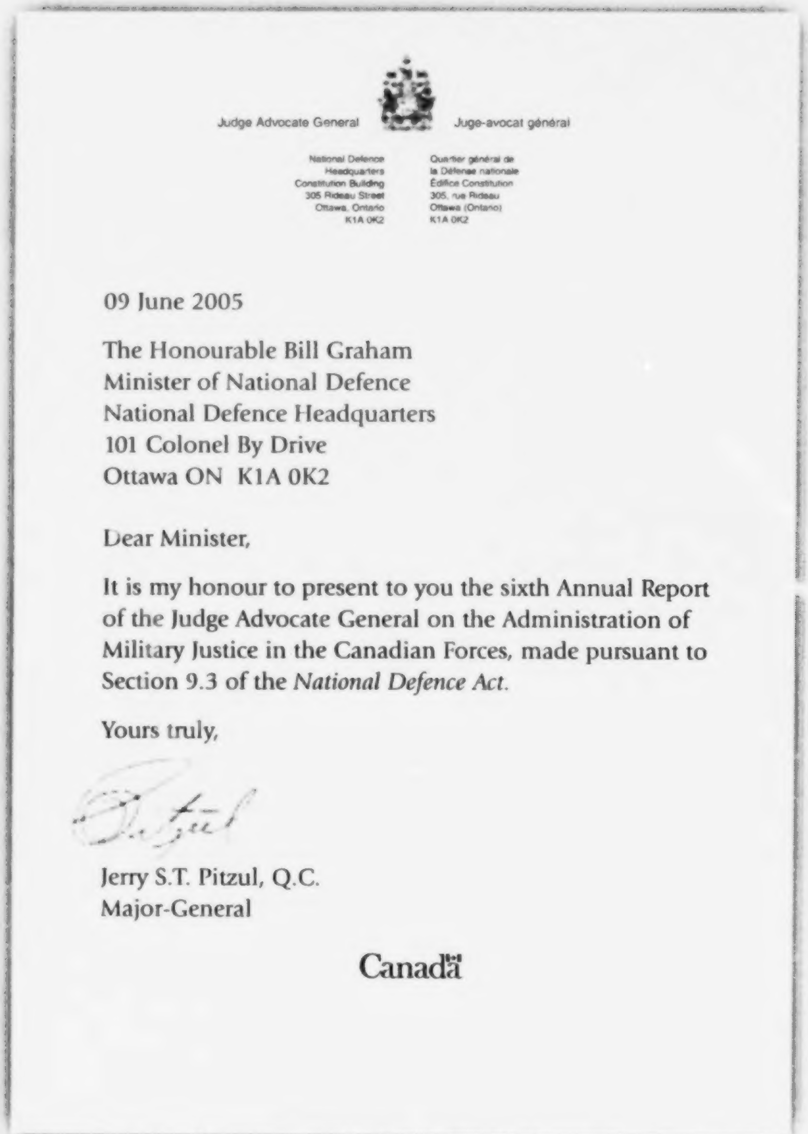

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09 June 2005

The Honourable Bill Graham
Minister of National Defence
National Defence Headquarters
101 Colonel By Drive
Ottawa ON K1A 0K2

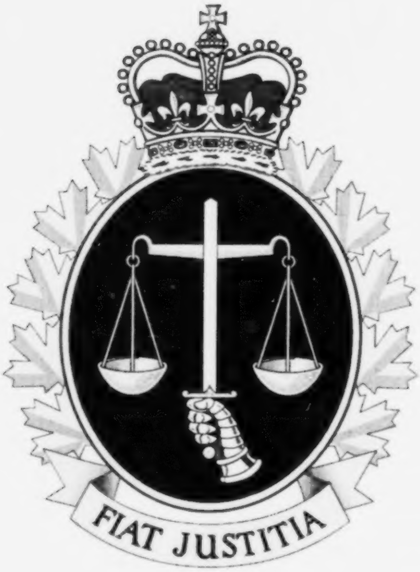
Dear Minister,

It is my honour to present to you the sixth Annual Report of the Judge Advocate General on the Administration of Military Justice in the Canadian Forces, made pursuant to Section 9.3 of the *National Defence Act*.

Yours truly,

Jerry S.T. Pitzul, Q.C.
Major-General

Canada



The maple leaves framing the badge of the Canadian Forces Legal Branch represent service to Canada, and the Crown, service to the Sovereign. The dark background of the central device signifies the blindfolded figure of justice, and symbolizes the impartiality of the justice system. Against the background the scales of justice are held aloft on a pointless curtana sword by a mailed right hand. The mailed hand represents military justice, while the pointless sword denotes the mercy that we trust prevails in judgement.

The motto *"FIAT JUSTITIA"* means, *"LET JUSTICE PREVAIL"*.

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# Judge Advocate General Communiqué

It is a great honour and privilege as Judge Advocate General (JAG) to present my sixth Annual Report to the Minister of National Defence on the administration of military justice in the Canadian Forces. The term military justice in this report is meant to include all activities in respect of the administration of the Code of Service Discipline, Part III of the *National Defence Act*.

A comprehensive examination of annual military justice surveys, statistics, and the First Independent Review of Bill C-25 by the Right Honourable Antonio Lamer P.C., C.C., C.D. have all indicated that the military justice system is responding well to the reforms that have occurred since 1998. As such, we have an excellent system for which we as Canadians should be very proud.

This report canvasses much of the work done during the reporting period concerning military justice in the Canadian Forces including:

- an overview of the service tribunal activity within the military justice system including proceedings at the summary trial, courts martial, and appeal court level;
- the proceedings of the military justice committees;
- the results of the survey on the summary trial process;
- military justice training activities;
- legislative and regulatory initiatives such as changes to the *National Defence Act* concerning Mental Disorder, DNA Databank, and revision of the Military Rules of Evidence; and
- other initiatives aimed at enhancing the operation of the military justice system.

This year was marked by the historic occasion of the first public ceremony recognizing the appointment of the Chief Justice to the Court Martial Appeal Court. In January 2005, Mr. Justice Edmund Blanchard replaced Chief Justice Barry L. Strayer who served the court as Chief Justice from 1994 until 2004. Commentaries by several distinguished guests highlighted the ceremony. Their remarks focused on the advancement of military law. This communion of the profession of arms, the profession of law, the public service, elected officials and its judiciary emphasized the importance of a disciplined military and the necessity for a strong military justice system which recognizes and protects the rights of all Canadian Forces members in accordance with the rule of law.

The Office of the JAG has also seen change as it has continued to position itself to provide more effective and efficient legal services. In particular, this year has seen the creation of the positions of Deputy Judge Advocate General/Military Justice & Administrative Law and Deputy Judge Advocate General/Regional Services. Such changes will streamline our ability to advise the chain of command on military justice issues as we continue to consolidate legal services under the three military law pillars: military justice, administrative law and operational law. The Office of the JAG has also started to enjoy the benefits of an intensive recruiting campaign that commenced in 2000–2001. Many of these legal officers have now acquired the experience needed to allow us to improve the provision of legal services.

The analysis and response to former Chief Justice Lamer's report on the operation of the Code of Service Discipline provisions of Bill C-25 have been completed and presented to the Minister of National Defence. Throughout the reporting period, a group of legal officers specializing in military justice law, referred to as the JAG Internal Review Team, conducted extensive policy analysis and consultations in developing the JAG advice to the Minister concerning an appropriate legislative response to the military justice recommendations contained in the Lamer Report. This team has consulted persons both within and outside the Department of National Defence on the recommended response. Those consulted include members of the Code of Service Discipline Committee, the JAG Advisory Panel, the Military Justice Round Table, Armed Forces Council, as well as officials from other government departments, the former Chief Justice of the Court Martial Appeal Court, and the Chair of the National Military Law Section of the Canadian Bar Association.

As in previous reports, we have surveyed the past but always with an eye to the future. We anticipate legal reforms as a result of the response to the Lamer Report. We have also positioned ourselves to be able to face all future challenges. The strength of the Office of the JAG lies in the strength of its people. I am proud to say that we have a team assembled that will allow us to continue to carry out our mission of providing effective and efficient legal advice and services in respect of the administration of military justice.

Pitzul

Jerry S.T. Pitzul, Q.C.
Major-General
Judge Advocate General

# CHAPTER 1

# The Office of the Judge Advocate General

## *1.1 Duties and Powers of the Judge Advocate General in Canadian Law*

Under the *National Defence Act* (NDA), the Minister of National Defence (MND) presides over the Department of National Defence (DND) and, through the Chief of the Defence Staff (CDS), gives direction to the Canadian Forces (CF). It is fundamental to Canada's political system that the armed forces are under the control and direction of the civil authority. As a democratically elected Member of Parliament and a member of the executive branch of government, the MND is the linchpin between the CF and the Government of Canada. With respect to the military justice system however, the requirements of constitutionality militate against any role for the Minister that would combine executive and judicial duties. Accordingly, the NDA makes provision to ensure that the military judiciary is insulated from the Minister, while also ensuring that the Minister receives the legal advice that he requires in order to remain properly informed about the administration of military justice. This allows the Minister to fulfill his role as the official who is accountable to Parliament for the Department of National Defence and the Canadian Forces.

The NDA provides for the appointment of the Judge Advocate General (JAG) by the Governor in Council,[1] and sets out the duties, powers and functions of the JAG. In addition to being the legal adviser to the Governor General, the Minister of National Defence, DND and the CF in matters relating to military law,[2] the JAG is also charged with the superintendence of the military justice system in the CF.[3]

## 1.2 Statutory Responsibility

The JAG is statutorily responsible to the Minister of National Defence and "accountable"[4] for the legal advice given to the Chief of the Defence Staff, the military chain of command, and to the Deputy Minister. This accountability structure was designed to ensure the independence of the Office of the JAG from the chain of command in the provision of legal advice in all areas, including military justice.

This independent role is reinforced in *Queen's Regulations and Orders* (QR&O) sub-articles 4.081(1) and (4), which provide that all legal officers whose duty is the provision of legal services shall be posted to a position established within the Office of the JAG and, in respect of the performance of those duties, a legal officer is not subject to the command of an officer who is not a legal officer.

An organization chart illustrating the JAG's position within both the CF and DND is contained at Annex C.

## 1.3 Organization of the Office of the JAG

The Office of the JAG comprises 120 regular force legal officer positions and 67 reserve force legal officer positions. Both regular and reserve force legal officers are employed throughout the CF, including legal advisers deployed on operations and exercises. They are also integrated into the defence and prosecution functions of the military justice system. During the reporting period, legal officers were employed, in Canada and abroad at the following locations:

---

[1] *National Defence Act*, Revised Statutes of Canada, 1985, Chapter N-5, section 9(1).

[2] NDA section 9.1.

[3] NDA section 9.2.

[4] For a detailed description of the concepts of responsibility, authority and accountability within the CF and DND, see the DND publication "Organization and Accountability", 2nd edition, September 1999.

- National Defence Headquarters (NDHQ) in Ottawa;
- The Office of the Department of National Defence/ Canadian Forces Legal Advisor (DND/CF LA);
- seven Assistant Judge Advocate General (AJAG) offices, including six in Canada and one in Germany;
- twelve Deputy Judge Advocate (DJA) offices across Canada;
- four Regional Military Prosecutor (RMP) offices across Canada;
- Supreme Headquarters Allied Powers (Europe) in Belgium;
- CF Joint Operations Group Headquarters and the Royal Military College of Canada (RMC) in Kingston;
- Deputy Commander North American Aerospace Defence Command Headquarters in Colorado, USA;
- International Institute of Humanitarian Law in San Remo, Italy; and
- with CF contingents deployed overseas — in Bosnia-Herzegovina, Afghanistan, the Gulf of Oman, Haiti, and Sri Lanka.

Organization charts for the regular and reserve components of the legal branch and contact and location information for all JAG offices are included at Annex B.

### *Strategic Use of Resources by the Office of the JAG*

Four years have passed since the Office of the JAG commenced an intensive recruiting program in 2000-2001. Although the recruitment and retention of reserve force legal officers is an ongoing challenge, the JAG currently has a full complement of regular force legal officers. While the training of these new officers may have required significant investment of resources over the last few years, many of the newly recruited officers now have the experience needed to place the Office of the JAG in a better position to continually improve the provision of legal services to the Department of National Defence and the Canadian Forces over the coming years.

As the pool of legal officers available to provide legal advice increases and deepens, the Office of the JAG continues to both strategically organize and consolidate its personnel under three military law pillars: military justice, operational law, and administrative law. To that end, the JAG created the positions of Deputy Judge Advocate General/Regional Services (DJAG/Reg Svcs) and Deputy Judge Advocate General/Military Justice and Administrative Law (DJAG/MJ&AL). These changes resulted in the transfer of authority for field offices from Deputy Judge Advocate General/Operations (DJAG/Ops) to DJAG/Reg Svcs and the movement of responsibility for military justice issues from Deputy Judge Advocate General/ Chief of Staff (DJAG/COS) to DJAG/MJ&AL. DJAG/COS has taken over responsibility for the Directorate of Law/Training (DLaw/T). Two new directorates were also created: Directorate of Law/Intelligence and Information Operations (DLaw/I&IO) and the Directorate of Law/Administrative Law (DLaw/AL).

## *1.4 Areas of the Office of the JAG Involved in Military Justice*

### *The Canadian Military Prosecution Service*

The Director of Military Prosecutions (DMP) holds office upon appointment by the Minister, who is the sole authority with the power to appoint and remove the DMP.[5] The DMP may only be removed from office by the Minister for cause, on the recommendation of an Inquiry Committee.[6]

Under the provisions of the NDA, the DMP is responsible for the preferring of all charges to be tried by court martial and the conduct of all prosecutions at courts martial. On 1 September 1999, the Minister instructed the DMP to act as counsel in respect of appeals.[7] In addition to these statutory responsibilities, the DMP is also the legal adviser to the Canadian Forces National Investigation Service (CFNIS) in the conduct of its investigations.

In exercising prosecutorial discretion in relation to the preferral of charges and the conduct of prosecutions, the DMP's independence is protected by both the institutional structures in the NDA and at common law.[8] In this way, the DMP's situation is analogous to that of a director of public prosecutions in the civilian criminal justice system.

---

[5] NDA section 165.1. The DMP holds office for a term not exceeding four years. Captain (Navy) Holly MacDougall was appointed DMP on 17 January 2005.

[6] NDA section 165.1(2) and QR&O article 101.18. The Inquiry Committee was not required to sit during 2004–2005.

[7] NDA section 165.11 provides for the DMP to act as counsel for the Minister in respect of appeals, when instructed to do so.

The NDA provides that the DMP is under the general supervision of the JAG, who may issue general instructions or guidelines in writing in respect of prosecutions or in respect of a particular prosecution.[9] There were no general instructions or instructions with respect to particular prosecutions issued during the reporting period.

Annex J of this report contains an abridged version of the Annual Report of the DMP.[10]

### *Director of Defence Counsel Services*

The Director of Defence Counsel Services (DDCS) is appointed by the Minister and holds office on good behaviour for a term not exceeding four years.[11] The DDCS provides, supervises and directs the provision of legal services to accused persons, as defined in regulations.[12]

The DDCS is statutorily insulated from other CF and DND authorities to protect the DDCS from potentially inappropriate influence. Defence Counsel Services' (DCS) lawyers represent their clients and their clients' interests in accordance with DDCS and JAG policies as well as the codes of conduct of their respective law societies. These are designed to preserve and enhance the legal and ethical obligations that defence counsel owe to their clients. Communications with their clients are protected at law by solicitor-client privilege.

---

[8] After the decision *Re Balderstone and R.* (1983), 8 C.C.C. (3d) 532 (Man.C.A.), leave to appeal to S.C.C. refused, [1983] 2 S.C.R. v., Canadian courts have placed significant legal restrictions on the review of the exercise of prosecutorial discretion. Courts will undertake such reviews only in the clearest case of abuse of process. See e.g. *Krieger* v. *Law Society of Alberta*, [2002] 3 S.C.R. 372, 2002 S.C.C. 65.

[9] NDA section 165.17. The JAG must give a copy of every such instruction to the Minister. The DMP must ensure that such instructions are made available to the public, except in limited cases where the DMP decides that release to the public of an instruction or guideline would not be in the best interests of the administration of military justice.

[10] The complete Annual Report of the DMP can be found at the CMPS website: www.forces.gc.ca/jag/military_justice/cmps/publications/default_e.asp.

[11] NDA section 249.18. On 1 September 2003, Lieutenant-Colonel Jean-Marie Dugas was appointed DDCS.

[12] QR&O article 101.20.

The DDCS acts under the general supervision of the JAG, who may issue general instructions or guidelines in writing in respect of defence counsel services.[13] However, the JAG may not instruct the DDCS concerning any particular defence or court martial. The JAG did not issue any general instructions to DDCS during the reporting period.

Annex I of this report contains the Annual Report of the DDCS.

### *Deputy Judge Advocate General/Military Justice and Administrative Law*

The Deputy Judge Advocate General/Military Justice and Administrative Law (DJAG/MJ&AL) is one of the two new DJAG positions created during the reporting period. DJAG/MJ&AL is responsible for providing DND and CF authorities with legal advice on military justice, personnel and administrative law issues. This is accomplished through the Directorate of Law/Military Justice Policy and Research (DLaw/MJP&R), the Directorate of Law/Human Resources (DLaw/HR), and the new Directorate of Law/Administrative Law (DLaw/AL).

DLaw/MJP&R assists the JAG in carrying out his superintendence and review functions of the military justice system, and supports the production of the JAG's Annual Report. The duties and responsibilities of DLaw/AL include giving advice with respect to administrative law matters, applications for redress of grievance, all types of administrative investigations including Boards of Inquiries, Canadian Forces Organizational Orders (CFOOs), Ministerial Organizational Orders (MOOs) and elections issues. DLaw/HR continues to advise DND officials and CF authorities on military personnel issues.

---

[13] NDA section 249.2. The DDCS must make any general instructions or guidelines available to the public.

### *Deputy Judge Advocate General/Operations*

The Deputy Judge Advocate General/Operations (DJAG/Ops) is responsible for providing DND officials and CF authorities with legal advice on international and operational law issues. DJAG/Ops also oversees all legal officers on deployed operations and through them provides deployed Military Police and deployed CF formations and units with legal advice on some military justice issues. Several changes were made to the DJAG/Ops organization during the reporting period. Prior responsibility for supervision of all AJAG and subordinate field offices has been transferred to the new position of DJAG/Reg Svcs. The Directorate of Law/Intelligence and Information Operations was also created under DJAG/Ops. It is responsible for providing advice on intelligence and information operations law issues including advising the chain of command on the production of witnesses and release of classified intelligence for international and domestic tribunals.

### *Deputy Judge Advocate General/Regional Services*

The Deputy Judge Advocate General/Regional Services (DJAG/Reg Svcs) is the second of the two new DJAG positions created this past year. The incumbent is responsible for the supervision of all field legal officers including all Assistant Judge Advocate Generals and through them, all Deputy Judge Advocates.

AJAGs and DJAs provide legal support to most of the regular and reserve force units in the Canadian Forces. Discipline being a cornerstone of an effective military force, the application of the Code of Service Discipline is of prime importance to the units. Therefore, AJAGs and DJAs play a fundamental role in advising commanders on military justice issues such as investigations, the laying of charges, the disposal of charges, and the referral of cases to courts martial. Field legal officers also provide legal advice to the Military Police employed at local bases and wings.

In addition to coordinating the provision of legal advice to local commanders, DJAG/Reg Svcs also provides legal advice to the Environmental Chiefs of Staff, Level 1s and Group Principals at National Defence Headquarters on issues such as summary trial reviews, referrals to courts martial and the designation of superior commanders for disciplinary purposes.

### *Deputy Judge Advocate General/Chief of Staff*

The Deputy Judge Advocate General/Chief of Staff (DJAG/COS) assumed responsibility during the reporting period for the Office of Military Legal Education, the Deputy Director of the International Institute of Humanitarian Law, and the Directorate of Law/Training. Through the Directorate of Law/Training, DJAG/COS is also responsible for developing and delivering military justice training such as the Presiding Officer certification and re-certification processes. DJAG/COS also oversees all non-legal military staff and all civilian staff in the Office of the JAG.

### *Judge Advocate General Chief Warrant Officer*

The JAG Chief Warrant Officer (CWO) serves as an information contact between the JAG, the chain of command and non-commissioned members in respect of the administration of military discipline.[14] This position ensures that the Office of the JAG has direct access to the disciplinary knowledge and experience of senior non-commissioned members of the CF. The JAG CWO is a key component of the network of chief warrant officers and chief petty officers first class in the regional AJAG offices and the DJA offices in Borden, Gagetown, and Petawawa.

## *1.5 Department of National Defence/ Canadian Forces Legal Advisor*

The Department of National Defence/Canadian Forces Legal Advisor (DND/CF LA) is responsible to the Minister of Justice for providing DND and the CF with legal advice on matters falling outside the JAG's area of responsibility. The staff of DND/CF LA includes civilian lawyers from the Department of Justice as well as military lawyers provided by the Office of the JAG. DND/CF LA and the Office of the JAG cooperate to deliver seamless legal services to their DND and CF clients. The drafting and coordination of legislation and regulations relating to military justice is a collaborative effort between DND/CF LA and the Office of the JAG.

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[14] CWO Marius Dumont has been the JAG CWO since its inception in 2001.

# CHAPTER 2

## Superintendence and Review of the Canadian Military Justice System

### 2.1 The Two Tiers of the Military Justice System

The NDA creates a two-tier system of military justice. The first tier, where most disciplinary matters are dealt with, is the summary trial system. The second tier is the more formal court martial system. The term "service tribunal" means either a court martial or a person presiding at a summary trial.[1]

### 2.2 Analysis of Summary Trial Statistics

#### Summary Trials in 2004–2005

Where a member is charged with a service offence, a summary trial permits the case to be dealt with quickly and, as a general rule, at the unit or formation level.[2] Of the 1471 persons tried in the military justice system during 2004–2005, 1407 (96%) were tried summarily. As in previous years, these statistics show that the summary trial remained the most commonly used form of service tribunal in the military justice system in 2004–2005.

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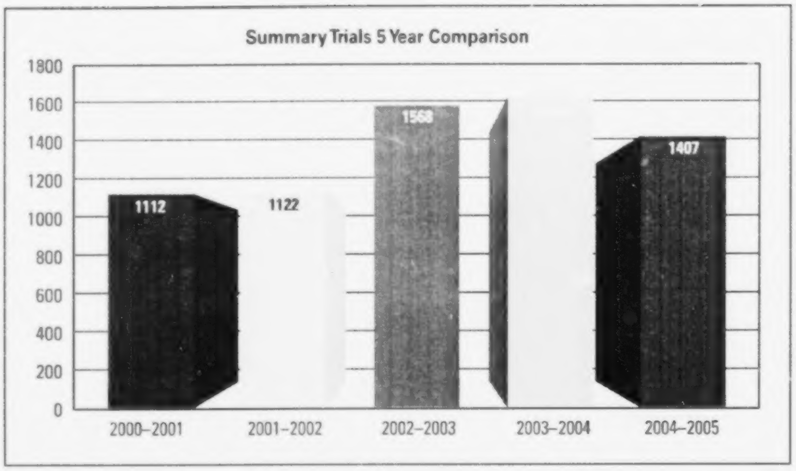
[1] NDA section 2.

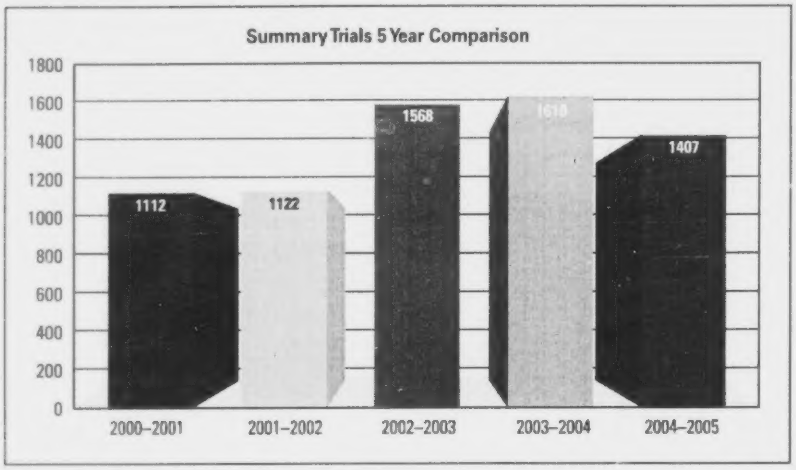
[2] Summary trials are presided over by delegated officers, commanding officers or superior commanders. For a comprehensive overview of the military justice system, see the Précis in Annex A.



Although the number of summary trials decreased slightly this year, it is well within the range of usage of summary trials since 2002.

The addition of this year's statistics continues to support the previously reported conclusion that CF members who have been given disciplinary responsibilities are developing proficiency with the summary trial process and are becoming more confident in their ability to use it as a disciplinary tool. The widespread acceptance of the summary trial as the preferred means of dealing with the vast majority of disciplinary matters is evidenced by the continuing very high percentage of accused persons (well above 90%) who choose summary trial when offered an election between summary trial or court martial.

It was reported last year that there was significant interest in the military justice system's response to misconduct involving drugs or alcohol. In 2004–2005, the proportion of drunkenness charges as a percentage of all charges laid remained constant compared to last year while the proportion of drug or alcohol-related charges that were laid under section 129 (prejudice to good order and discipline) of the NDA decreased from 5.5% to 1.95%. The number of charges under section 130 of the NDA that related to violations of the *Controlled Drugs and Substances Act* remained marginal,



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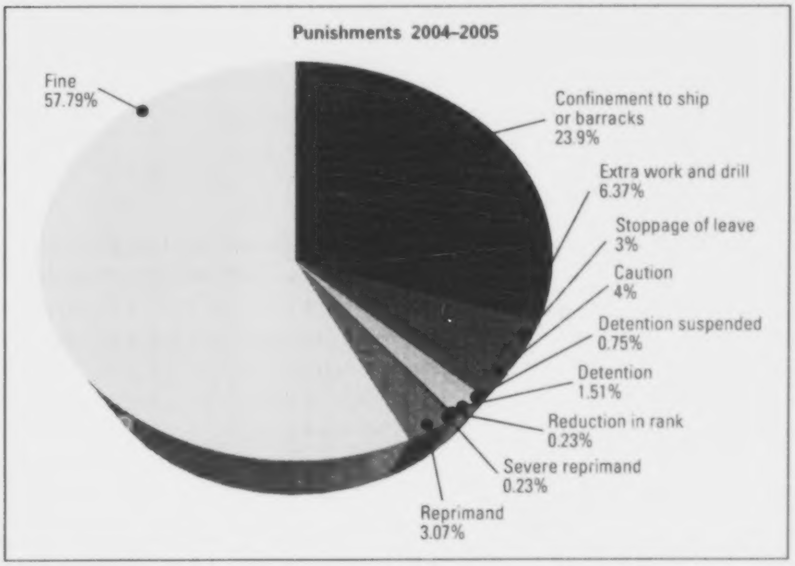
Minor punishments and fines again accounted for the vast majority of the sentences awarded at summary trials during the reporting period. The use of such punishments is certainly consistent with the fundamental goals of the summary trial system since it permits the offender to remain an effective member of their unit while serving their sentence. Punishments meted out in 2004–2005 are almost identical percentage wise compared to last year.



**Punishments 2004–2005**

The average time from the date of the laying of charges to final disposition by summary trial decreased from 11 to 10 days during the reporting period. Since part of the rationale for the summary trial is that it provides unit commanders with a tool to deal with minor service offences in a prompt manner, this figure shows the continuous efficiency of the summary trial system.

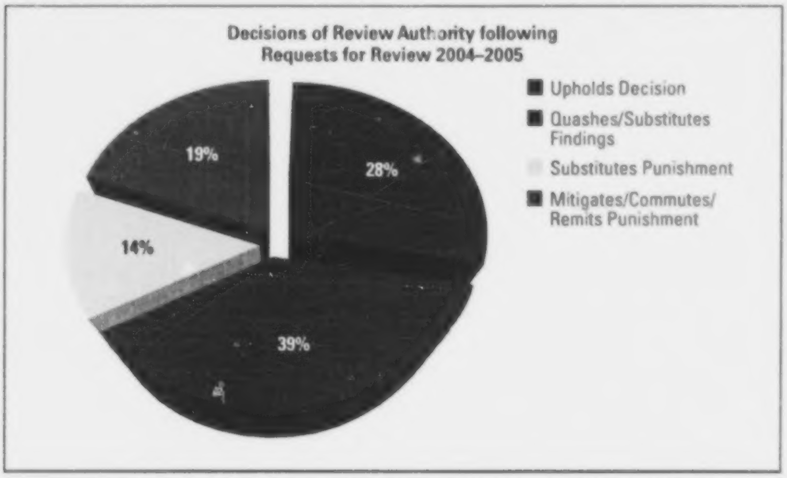
Detailed statistics for summary trials conducted during the reporting period 1 April 2004 to 31 March 2005 are included at Annex D.

### *Applications for Review of Summary Trials in 2004–2005*

All offenders convicted at summary trial have the right to apply to the presiding officer's next superior in the disciplinary chain of command for a review of the finding, the punishment imposed, or both.[3] Review authorities acting under QR&O article 108.45 must obtain legal advice before making any determinations on requests for review.[4] The findings and punishment imposed at summary trial may also be reviewed on the independent initiative of a review authority.[5]

During the reporting period, 36 convicted persons made requests for review which is an increase from 26 applications last year. Of the applications, 6 related to the finding, 13 related to the sentence, and 17 related to both the finding and the sentence. Review authorities reversed or modified the finding, punishment imposed or both in 26 of the 36 cases.

While the overall percentage of offenders asking for a review increased by only 1%, this year's figures may be interpreted as an indication of the CF members' awareness of their right for review. The following pie graph depicts the final disposition of applications for review made during the reporting period.


Decisions of Review Authority following Requests for Review 2004–2005

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[3] QR&O article 108.45.

[4] QR&O article 108.45(8).

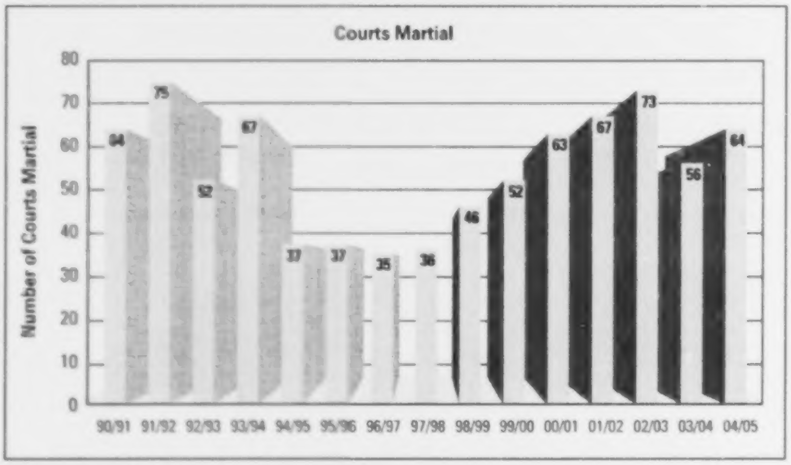
[5] NDA section 249 and QR&O article 116.02.

## 2.3 Analysis of Court Martial Statistics

While the summary trial system is designed to provide unit commanders with the ability to deal with minor service offences in a prompt but fair manner, the court martial procedure is more formalized and is normally reserved for more serious cases. Each court martial is presided over by a military judge who is independent of the chain of command. The accused is entitled to be represented by defence counsel provided by the Director of Defence Counsel Services, or the accused can choose to be represented by civilian counsel at his or her own expense.

### *Courts Martial in 2004–2005*

During 2004–2005, 64 courts martial were conducted across the CF. As shown in the following histogram, this year's statistics represents the average over the past 5 years.



Information on courts martial is publicly available through the web sites of both the JAG and the Office of the Chief Military Judge.[6] Detailed statistics for courts martial conducted during the reporting period 1 April 2004 to 31 March 2005 are included at Annex E.

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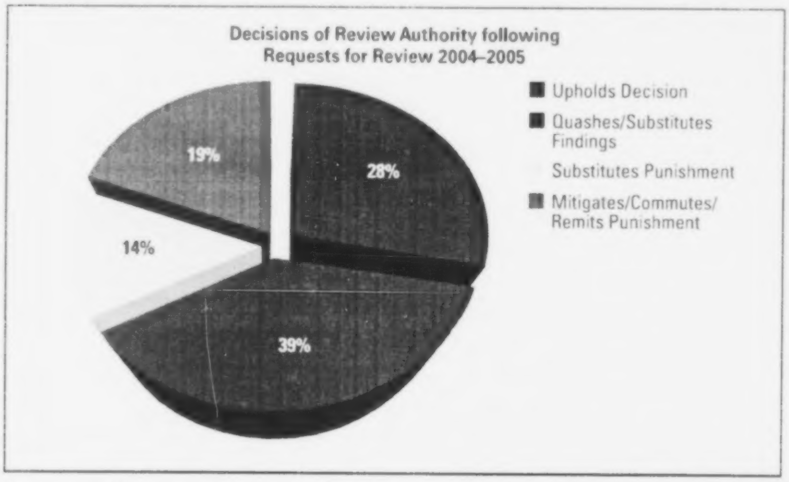
[6] The JAG web site is www.forces.gc.ca/jag/ and the web site of the Office of the Chief Military Judge is www.forces.gc.ca/cmj/.

### *Applications for Review of Summary Trials in 2004–2005*

All offenders convicted at summary trial have the right to apply to the presiding officer's next superior in the disciplinary chain of command for a review of the finding, the punishment imposed, or both.[3] Review authorities acting under QR&O article 108.45 must obtain legal advice before making any determinations on requests for review.[4] The findings and punishment imposed at summary trial may also be reviewed on the independent initiative of a review authority.[5]

During the reporting period, 36 convicted persons made requests for review which is an increase from 26 applications last year. Of the applications, 6 related to the finding, 13 related to the sentence, and 17 related to both the finding and the sentence. Review authorities reversed or modified the finding, punishment imposed or both in 26 of the 36 cases.

While the overall percentage of offenders asking for a review increased by only 1%, this year's figures may be interpreted as an indication of the CF members' awareness of their right for review. The following pie graph depicts the final disposition of applications for review made during the reporting period.



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[3] QR&O article 108.45.

[4] QR&O article 108.45(8).

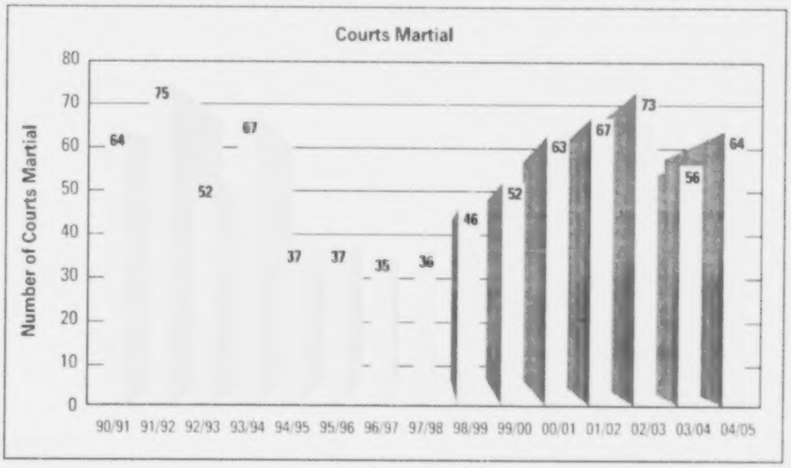
[5] NDA section 249 and QR&O article 116.02.

## 2.3 Analysis of Court Martial Statistics

While the summary trial system is designed to provide unit commanders with the ability to deal with minor service offences in a prompt but fair manner, the court martial procedure is more formalized and is normally reserved for more serious cases. Each court martial is presided over by a military judge who is independent of the chain of command. The accused is entitled to be represented by defence counsel provided by the Director of Defence Counsel Services, or the accused can choose to be represented by civilian counsel at his or her own expense.

### Courts Martial in 2004–2005

During 2004–2005, 64 courts martial were conducted across the CF. As shown in the following histogram, this year's statistics represents the average over the past 5 years.



Information on courts martial is publicly available through the web sites of both the JAG and the Office of the Chief Military Judge.[6] Detailed statistics for courts martial conducted during the reporting period 1 April 2004 to 31 March 2005 are included at Annex E.

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[6] The JAG web site is www.forces.gc.ca/jag/ and the web site of the Office of the Chief Military Judge is www.forces.gc.ca/cmj/.

## 2.4 Review and Reporting Framework

The JAG is tasked with the superintendence of the administration of military justice. This task requires the monitoring and assessment of the system using methods such as statistical analysis, independent professional analysis and standardized quantitative and qualitative reports from the system's key participants. The current review and reporting framework was designed in 1999–2000 with these objectives in mind. In addition, it has proven to be an effective means of identifying trends and issues in the military justice system that require closer analysis.

## 2.5 Military Justice Surveys

Surveys are an essential element of the military justice review and reporting framework discussed above. They assist in compiling a comprehensive overview of the state of the military justice system and complement the information that is derived from periodic reports of key actors within the system and specialized reports such as compliance audits. Although they are useful, surveys tend to be costly. Consequently, the Office of the JAG uses surveys conservatively and when possible employs surveys for more than one purpose, such as the client satisfaction survey.

### Interview Survey of Stakeholders

This survey involves individual interviews with various participants in the military justice system, including commanding officers, charge laying authorities and referral authorities. These interviews are conducted by an officer from the Directorate of Military Justice Policy and Research or by the JAG Chief Warrant Officer. The value of this particular survey is that individual interviews may result in the identification of important issues that are not apparent from statistical information. However, this survey demands a significant number of person-days out of the office for JAG staff. It was not used during this reporting period, having been conducted in 2001 and 2002. However, it will continue to be used periodically as it has proven to be a valuable information collection tool.

### *Client Satisfaction Survey*

The third annual JAG Client Satisfaction Survey was completed during the reporting period. This survey is conducted by means of questionnaires that are emailed to principal clients of the Office of the JAG. While it does not focus primarily on military justice issues as such, this survey does collect responses from a target audience that includes persons who frequently utilize the military justice system. The client satisfaction survey for the reporting period indicates that members of the chain of command are generally pleased with the professionalism and dedication of legal officers in their provision of efficient legal advice. For details of this survey, see the JAG Annual Performance Report — Fiscal Year 2004–2005.[7]

### *Independent Professional Survey on the Summary Trial Process*

This professionally run survey constituted the major military justice survey activity during 2004–2005. With the assistance of the Chief of Review Services (CRS), the Office of the JAG engaged the private sector consulting firm of KPMG and its affiliate BearingPoint, to conduct a CF-wide survey on the administration of summary trials.[8] This survey was designed to:

- indicate how well CF members and units are complying with the regulations concerning the conduct of summary trials;
- contribute to the growing body of statistical information against which the performance of the military justice system can be monitored;
- contribute to the ongoing review of the NDA reforms; and
- determine the effect of enhanced military justice training over the past five years.

The survey questionnaire targeted all commanding officers and persons who have been involved in the summary trial process since January 2004 as accused persons, assisting officers, presiding officers (delegated officers, commanding officers or superior commanders), commanding officers, review authorities or charging authorities.

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[7] Online: www.forces.gc.ca/jag/office/publications/performance_reports/PerformanceReport2005_e.pdf.

[8] Online: www.forces.gc.ca/jag/office/publications/compliance_survey/KPMG04-05_e.pdf.

The questionnaire was hosted on the BearingPoint web site and was electronically accessible through the DND/CF Internet web site and the DND/CF intranet. Paper copies were also mailed out to selected units, based on their usage of the summary trial system over the previous year.

The survey elicited an excellent response from all levels of participants again this year with an increase of 10% which is back in line with the number of respondents in 2003. Despite minor fluctuations, the percentage of participants from each of the categories of respondents seems to have stabilized over the past 3 years.

The responses are detailed as follows:

| Data Source | Response on paper | Response by e-mail | Number of responses | Share of responses |
|---|---|---|---|---|
| Accused | 23 | 102 | 125 | 14.1% |
| Assisting Officer | 31 | 165 | 196 | 22.0% |
| Presiding Officer | 20 | 159 | 179 | 20.1% |
| Commanding Officer | 5 | 171 | 176 | 19.8% |
| Review Authority | 1 | 9 | 10 | 1.1% |
| Charging Authority | 18 | 185 | 203 | 22.8% |
| **Total** | **98** | **791** | **889** | **100%** |

### *Survey Results*

The format of the 2005 survey on the summary trial process was based upon versions of the survey questionnaire utilized in 2004 and earlier. Changes to the survey format have been limited to incremental modifications over the five years the survey has run, in order to compile responses that focus on the same or similar areas of inquiry and to create a historical record of service members' views on these issues.

The survey measures adherence to the three tenets of fairness in the summary trial system as detailed below:

**Tenet 1: Compliance with regulatory requirements relating to the administration of military justice.**

a. Commanding officers are certified by the Office of the JAG to perform their duties in the administration of the Code of Service Discipline.

b. Each unit maintains a Unit Registry of Disciplinary Proceedings.

c. Records of Disciplinary Proceedings (RDPs) are completed correctly, including the final disposition of all charges, and submitted for review to the local AJAG or DJA and, ultimately, to the JAG.

d. Legal advisers and review authorities give timely feedback.

e. Requests from the public for access to Records of Disciplinary Proceedings are handled appropriately.

This year's survey continues to indicate that units are reporting a high degree of compliance with the regulatory requirements relating to the administration of summary trials. Survey results and an audit performed by the Chief of Review Services also confirmed that commanding officers are complying with regulations that require units to maintain Unit Registries of Disciplinary Proceedings. As in previous surveys, satisfaction levels concerning timeliness of the provision of legal advice by unit legal officers remain between 79% and 89%. A marginal but recurring comment over the years from charging authorities calls for greater legal officer availability and prompter response times when providing legal advice.

**Tenet 2: Each accused receives fair treatment at summary trial.**

a. Trials are held in the official language chosen by the accused.

b. Accused persons who are entitled to elect trial by court martial are given the opportunity and legal support to do so.

c. Accused persons receive:
   (1) all information identified in the regulations,
   (2) access to the evidence that will be used to support the charge, and
   (3) a list of witnesses who will testify to support the charge.

d. Accused persons are given the opportunity to exercise their right to put their case to the presiding officer before a finding is made.

e. Accused persons are given the opportunity to exercise their right to present evidence of mitigating considerations before sentence is passed.

This year's results again demonstrated substantial compliance in these areas. Most assisting officers opined that sufficient time was given to consult legal counsel prior to the accused person's election between summary trial and courts martial. While slightly fewer responding accused persons agreed with their assisting officers in this regard, less than 3% of all accused who responded stated they had asked for more time and were not given more time to consult legal counsel. Over the past five years, 4 of 5 accused persons and 9 of 10 assisting officers claimed that they have received a list of all relevant potential witnesses and access to all of the evidence that will be used to support the charge against them. This year's figures are in line with the past five year average of 75.5% of accused persons stating that they felt they were permitted to question witnesses during their trial. The responses from assisting officers clearly indicate that accused persons are indeed permitted to ask questions during their trials.

**Tenet 3: The system for reviewing the decisions made at summary trial is fair and responsive.**

a. All accused persons are informed of their right to seek review.

b. The review process is efficient.

Over the past four reporting periods, concerns have been raised concerning the potential low level of awareness amongst persons found guilty at summary trial of their right to seek review of the findings and or sentence of the presiding officer. Attempts to increase awareness through military justice training and the distribution of CF publications such as the *Code of Service Discipline and Me* and the *Guide for Accused and Assisting Officers* have had limited results. This year, our efforts are starting to pay off. Indeed, there was an increase of 16% in the number of accused persons who responded that they were aware they could request a review. This increase suggests promise for an enhanced awareness amongst accused persons. Also important to note are the responses of assisting officers concerning awareness of the right to seek review as it is their responsibility to so inform accused persons. Compared to 77% of assisting officers who stated in 2000 that they had informed their accused of the right to request review, this year's survey indicates that 93% of assisting officers have fulfilled their obligations in this regard.

The right to seek a review of a summary trial is an important element of the process and as such, it will continue to be a significant concern for the Office of the JAG to determine how best to continue to increase service members' awareness of this right.

***Analysis of Survey Results***

This was the fifth year that this military justice survey has been conducted. This year's survey builds on the information obtained from the preceding four annual surveys. Given the nature of these surveys, the information gathered serves only as a rough indicator of issues and potential problem areas. Further information must be gathered to confirm any potential trends.

The main issues that have been followed over the past number of years include the importance of the role of education and training of all persons involved in the military justice system, the importance of the role of the assisting officer, concerns over the need for the provision of prompt legal advice, the ability for accused persons to access evidence prior to summary trials, and the need for accused persons to know and understand their right to seek review after a summary trial.

The Office of the JAG is certainly committed to monitor the administration of military justice to ensure all members are treated fairly and in accordance with the law.

## 2.6 Five Year Review of the Bill C-25 Amendments to the National Defence Act

Significant amendments to the *National Defence Act* were made in 1998 by Bill C-25, *An Act to amend the National Defence Act and to make consequential amendments to other Acts*, S.C. 1998, c. 35. The legislative process which led to these amendments had its origins in the aftermath of the deployment of the Canadian Forces to Somalia, and the various inquiries and reports which were precipitated as a result of that deployment and subsequent incidents. The changes to the military justice system affected by Bill C-25 were profound. In order to assess the effectiveness of these changes, Section 96 of Bill C-25 required that an independent review of the provisions and operations of Bill C-25 be conducted within five years of that Act receiving Royal Assent. Pursuant to this requirement, the Minister of National Defence appointed the

Right Honourable Antonio Lamer, former Chief Justice of the Supreme Court of Canada, to conduct the review as the Independent Review Authority. As discussed in last year's JAG Annual Report, the JAG Internal Review Team (JIRT) assisted the Independent Review Authority in his review by preparing and delivering three separate reports addressing substantive military justice issues. Former Chief Justice Lamer submitted his report on the provisions and operation of Bill C-25 (the Lamer Report) to the Minister on 3 September 2003,[9] and the Minister tabled the report in Parliament on 5 November 2003.

In his report, former Chief Justice Lamer made 88 recommendations: 57 pertaining to the military justice system, 14 regarding the Canadian Forces Provost Marshal and the Military Police Complaints Commission process, and 17 concerning the Canadian Forces grievance process.

As former Chief Justice Lamer noted, his report was not precipitated by serious incidents leading to a perception of deficiencies within Canada's military justice system. The current situation, in which incremental improvements to the military justice system may be considered in a measured fashion, thus stands in contrast to the situation which prevailed in 1997 which necessitated the significant and large-scale changes to the system contained in Bill C-25.

In the foreword to his report, former Chief Justice Lamer indicated that, as a result of the changes made by Bill C-25, "Canada has developed a very sound and fair military justice framework in which Canadians can have trust and confidence." Indeed, in his conclusion, he indicated that observers in other countries see it as a system that their country might wish to learn from. That being said, he also observed that there does remain room for improvement in the military justice system, and it is in that spirit that the study of the Lamer Report recommendations respecting the military justice system by the JAG Internal Review Team was conducted.

Extensive policy analysis and consultation both within and outside the Department of National Defence have been undertaken by the JAG Internal Review Team in developing the JAG recommendations concerning an appropriate legislative response to the military justice recommendations contained in the Lamer Report. Those consulted included members of the Code of Service Discipline Committee, the JAG Advisory Panel, the Military Justice Round Table and Armed Forces Council, as well as officials of other Government departments, the former Chief Justice of the Court Martial Appeal Court, and the Chair of the National Military Law Section of the Canadian Bar Association. Implementation of the Lamer Report recommendations would require amendments to the *National Defence Act*, along with regulatory amendments to the *Queen's Regulations and Orders* for the Canadian Forces and changes to some administrative practices.

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[9] The Lamer Report may be accessed online at: www.forces.gc.ca/site/reports/review/en/report_e.pdf.

Advice has been provided to Government concerning the recommended way ahead. Further developments are anticipated in the next reporting period.

## 2.7 Other Issues Related to Superintendence and Review

### Implementation of Recommendations of CRS Audit of Court Martial Sentences

The Chief of Review Services reported to JAG in July 2002 concerning the implementation of punishments imposed at courts martial. The audit recommendations noted that sentences, especially fines, were not always being carried out. CRS suggested that a lack of a central monitoring authority was partially responsible. As a result, in April 2003, the JAG through his Directorate of Law/Military Justice Policy and Research, agreed to assume the role of national monitoring authority of court martial sentences.

Commanding Officers (COs) of each convicted offender's home unit have the responsibility to ensure that sentences are carried out. As such, upon conviction, the Director of Military Prosecutions (DMP) sends a message to the unit outlining the CO's responsibilities. In order to facilitate monitoring, the CO is also told to send a message to MJP&R when the sentence is fulfilled. MJP&R is also given notice of convictions through a message from DMP and is able to track the status of each case. If MJP&R has not received a message from a unit confirming sentence completion after sufficient time has passed, the Office of the JAG can follow up with the unit.

MJP&R is confirming that all sentences from 1999 to present have been actioned. MJP&R will continue to monitor each case and liase with COs and other offices as necessary to help ensure successful completion of all courts martial sentences.

***CRS Review of Unit Registry of Disciplinary Proceedings***

Upon the JAG's request, the Chief of Review Services conducted a review of CF units' compliance with the regulatory requirements concerning the Unit Registry of Disciplinary Proceedings during the reporting period.[10] Pursuant to regulations, units must maintain a registry of disciplinary records and provide public access to certain records on request. The JAG has reviewed the results of the CRS draft report. A Management Action Plan has been drafted and will be sent to CRS during the next reporting period.

## *2.8 Committees on Military Justice*

### *Military Justice Stakeholders' Committee*

The Military Justice Stakeholders' Committee is a forum for the discussion of a wide variety of long-term strategic issues related to military justice. It is chaired by the Chief Justice of the Court Martial Appeal Court, and includes the Minister of National Defence, the JAG, the Chief of the Defence Staff, the Vice Chief of the Defence Staff, the Chief Military Judge, the Director of Defence Counsel Services, the Director of Military Prosecutions, and the Canadian Forces Provost Marshal.

Several attempts were made to convene the Military Justice Stakeholders' Committee during the reporting period. However, the committee was not able to meet due to the unavailability of several members.

The next meeting of the Military Justice Stakeholders Committee has been scheduled for 2 May 2005, early in the next reporting period. The agenda will include an update on various legislative initiatives affecting the military justice system, and a discussion of several proposals for enhancements to the system, including new Military Rules of Evidence, Electronic Notification and Publication of QR&O, improvements to the training of Assisting Officers for summary trials, and the creation of an advisory committee to assist the Chief Justice with revision of the Rules of the Court Martial Appeal Court.

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[10] QR&O chapter 107, section 4.

### *CF Code of Service Discipline Committee*

The CF Code of Service Discipline Committee is co-chaired by the Chief of the Defence Staff and the JAG. The committee members include the senior leadership of the CF (officers as well as chief warrant officers and chief petty officers first class) and other key players in the military justice system, such as the Director of Military Prosecutions, the Canadian Forces Provost Marshal and the JAG Chief Warrant Officer.

The CF Code of Service Discipline Committee is a forum where users of the military justice system can discuss matters of practical concern, and the JAG can obtain input from senior leaders on broad policy issues.

The Code of Service Discipline met on 7 September 2004. The committee was given an overview and opportunity to discuss several important military justice legislative initiatives including changes to the *National Defence Act* in relation to the *Sex Offender Information Registration Act*, the *Criminal Code* (Mental Disorder Legislation) and the *Criminal Code* (DNA Databank Legislation). Further, briefings and discussions dealt with the audit requested by JAG and completed by the Chief of Review Services concerning the Maintenance of Unit Registry of Disciplinary Proceedings. Also addressed were proposed audits canvassing other military justice issues including, Publication and Distribution of *Queen's Regulations and Orders* and the Promulgation of Defaulter's Rules by Units. The JAG briefed the committee on the 2004 JAG Annual Report to the Minister of National Defence. The committee was also provided with an overview of the proposed responses to the military justice recommendations from the Report of the First Independent Review of Bill C-25 (the Lamer Report).

### *JAG Advisory Panel on Military Justice*

The mandate of the JAG Advisory Panel is to review new military justice initiatives and provide an external perspective before they are implemented. In doing so, the structure of the panel ensures that the military justice system has the benefit of the ideas and experience from the civilian criminal justice system. The panel is chaired by the JAG with the other members being civilians with extensive criminal law experience including Mr. Justice Walter Goodfellow, Me Daniel Bellemare, c.r., Me Elise Groulx, Dr. Ian Holloway and Mr. Eugene Meehan, Q.C.

The Advisory Panel members met at the Office of the JAG on September 30, 2004. The meeting focused on a number of the recommendations of the Lamer Report. In particular, the panel discussed the recommendations that concern the court structure and the military judiciary, including issues related to the proposed creation of a permanent military court. The members of the Advisory Panel provided very useful suggestions concerning the recommendations.

### *Military Justice Round Table*

The Military Justice Round Table is an internal forum designed to integrate legal officers' views and recommendations into policy, regulation and legislation, as appropriate. It is comprised of senior legal officers from the Office of the JAG, the Director of Defence Counsel Services, the Director of Military Prosecutions, and DND/CF Legal Advisor, as well as additional members as required when dealing with specific issues.

The Military Justice Round Table met on 23 and 24 November 2004. The discussions concerned the proposed response to the Lamer Report's recommendations relating to the military justice system. Privilege and cabinet confidence considerations preclude a more fulsome discussion of what was considered and recommended in respect of the proposed legislative response at this time.

# CHAPTER 3

## Judge Advocate General Initiatives

### 3.1 Introduction

Pursuant to the NDA, the JAG's responsibilities include the superintendence of the military justice system. In addition, the NDA requires that the JAG report annually to the Minister of National Defence on the administration of military justice. In fulfillment of those statutory duties, the JAG monitors the progress of the initiatives that he has undertaken to enhance the military justice system.

This chapter highlights the status of military justice initiatives in the following areas:

- court martial delay;
- statutory and regulatory changes related to military justice;
- policy guidance promulgated during the reporting period;
- military justice training and education; and
- other military justice superintendence and review initiatives undertaken during the 2004–2005 reporting period.

### 3.2 Court Martial Delay

Court martial delay continues to be an outstanding issue. Since noted four years ago, delays at courts martial have been an on-going challenge both for commanders and the CF legal community. Several causes were identified over the years and positive steps were taken to address them. Much of the delay was initially determined to be attributable to the extensive reforms of the military justice system that occurred in 1998. As such, additional resources and extensive training were utilized to reduce the impact of the reforms on the delay. While progress was noted on some fronts in the Annual Reports in 2002–03 and 2003–04, the total number of days from charge laid to the start of court martial keeps averaging around 260 days. Isolated gains made in given stages of the court martial process in given years have indeed been counterbalanced by reciprocal losses in other stages. While we intend to continue to closely monitor court martial delay and invest resources to improve the overall timelines to bring cases to trial, one must realize the inherent constraints of running a complex, deployable military justice system with a fixed amount of resources.

## 3.3 Statutory Amendments

### Sex Offender Information Registration Act

Bill C-16, which received Royal Assent on 1 April 2004, came into force on 15 December 2004. The *Sex Offender Information Registration Act* and the amendments to the *Criminal Code* included in Bill C-16 create a national sex offender registration scheme with respect to offenders convicted of designated sexual offences by Canadian criminal courts. Offenders who are convicted after 15 December 2004 and those who were serving a sentence for certain sexual offences on that date may be required to register and report annually as well as when changes to their personal information occur. The national sex offender registry will provide police with ready access to certain information with respect to registered sex offenders in investigations of crimes of a sexual nature, such as residential and employment addresses, aliases used and physical characteristics.

The government has committed to making legislative amendments to ensure that Canadian legal norms, currently exemplified in the national sex offender registry scheme, are reflected within the military justice system. To this end, the introduction of amendments to NDA are anticipated within the next reporting period which will allow registration of offenders in the national sex offender registry who have been convicted of designated sexual offences under the NDA.

### *Bill C-10 An Act to amend the Criminal Code (Mental Disorder) and to make consequential amendments to other acts including the National Defence Act*

Bill C-10 amends the *National Defence Act* to ensure consistency between Canadian criminal law and the military law as it relates to persons found unfit to stand trial or not criminally responsible on account of mental disorder. It was tabled on 8 October 2004 and has been reviewed by the Standing Committee on Justice, Human Rights, Public Safety, and Emergency Preparedness. The committee reported back to the House of Commons in December 2004. The Bill passed third reading as amended by committee in the House of Commons on 7 February 2005 and was introduced to the Senate on 8 February 2005. The Senate's Legal and Constitutional Affairs committee should review the bill during the next reporting period.

The reforms in Bill C-10 are an attempt to modernize the law and are in response to a 2002 House of Common's Standing Committee report entitled, "Review of the Mental Disorder Provisions of the Criminal Code."[1] The amendments are also needed to address the June 2004 Supreme Court of Canada decision, *R.* v *Demers.*[2] At present, both the *Criminal Code* and the *National Defence Act* have provisions that allow the "system" to maintain criminal jurisdiction over persons found unfit to stand trial. This jurisdiction continues until the accused is found fit to stand trial or the prosecution is unable to establish a *prima facie* case. In *Demers*, the court found that continuous subjection of a permanently unfit accused to the criminal process, where there is no evidence of significant threat to public safety, makes the law overbroad and therefore unconstitutional. Bill C-10 includes provisions for a court to enter a stay of proceedings where an accused is unlikely to ever become fit to stand trial and poses no significant threat to the safety of the public.

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[1] Online: canada.justice.gc.ca/en/dept/pub/tm_md/provisions.html.

[2] *R.* v. *Demers*, [2004] 2 S.C.R. 489.

### *Bill C-13 An Act to amend the Criminal Code, the DNA Identification Act and the National Defence Act*

Bill C-13, An *Act to amend the Criminal Code, the DNA Identification Act and the National Defence Act* was tabled on 14 October 2004 and referred to the Standing Committee on Justice, Human Rights, Public Safety and Emergency Preparedness on 2 November 2004. The bill's purpose is to clarify and strengthen the legislation under which courts are authorized to make DNA Data Bank orders and under which the product of such orders is maintained in the National DNA Data Bank.

The bill amends the *National Defence Act* in respect of the taking of bodily substances for forensic DNA analysis and the inclusion of DNA profiles in the national DNA data bank. In particular, it adds offences for which a DNA sample might be taken, provides for the review of defective DNA data bank orders, compels offenders to appear at a certain time and place to provide a DNA sample, and allows for a DNA data bank order to be made after sentence has been imposed.

The clause-by-clause review of Bill C-13 by the Standing Committee is expected to occur mid-April 2005. The Bill should then proceed to second and third reading at the House of Commons and then be reviewed by the Senate Standing Committee on Justice, Human Rights, Public Safety and Emergency Preparedness.

## *3.4 Changes in Regulations*

### *Military Rules of Evidence*

The project to update the *Military Rules of Evidence*, which govern the admissibility of evidence at courts martial, continued throughout this reporting period. Considerable work was completed in the autumn and winter, allowing the JAG working group and DND/CF LA drafting specialists to complete a comprehensive draft which is currently being reviewed within the Office of the JAG. Following this review, the draft Military Rules of Evidence will be forwarded to the Department of Justice Regulatory Section for further review and approval prior to the Military Rules of Evidence being passed into law as regulations pursuant to section 181 of the NDA.

## 3.5 Judge Advocate General Policy Guidance

The JAG may issue instructions or guidelines in writing concerning prosecutions or defence counsel services, pursuant to subsections 165.17(2) and 249.2(2) of the NDA, respectively. During the 2004–2005 reporting period, no such direction was given specifically to either DMP or DDCS.

## 3.6 Military Justice Education & Training

The Office of the JAG is responsible for all legal training provided to the CF. All Canadian military personnel must be knowledgeable of the military justice system, particularly those personnel who perform specific functions in disciplinary proceedings. Legal officers from the Office of the JAG routinely provide military justice instruction to CF personnel — instruction on their rights and entitlements under the Code of Service Discipline, on the investigation and laying of charges, and particularly on the conduct of summary trial proceedings. The focal point for training on summary trial proceedings is the officers — superior commanders, commanding officers and delegated officers, who are empowered under regulations to exercise powers of trial and punishment. Before an officer can preside at a summary trial, he/she is required to be trained in the administration of the Code of Service Discipline and certified as qualified to perform these duties. This training and certification process is called Presiding Officer Certification Training (POCT).

### Presiding Officer Certification Training (POCT)

In 2004/2005 legal trainers from the Office of the JAG conducted 45 two-day Presiding Officer Certification Training (POCT) courses at 27 locations across Canada and outside of Canada. Of these courses, 41 were conducted in English and four in French. For the benefit of reserve force personnel, 13 courses were conducted on weekends. It should be noted that deployed legal officers also conducted 3 POCT courses overseas for CF personnel currently engaged in international peace support operations.

The purpose of POCT is to deliver a curriculum of training established by the JAG to prospective superior commanders, commanding officers and delegated officers before they assume their duties in respect of military justice and discipline. Successful graduates of the training are certified by the JAG as being qualified to perform their roles as presiding officers for a period of four years. Now in it's 7th year, the feedback from POCT trainees consistently indicates that the officers feel much better prepared to deal with summary trial matters after receiving the training. Over 5,500 CF officers have undergone the training and been certified as of the reporting date.

While POCT is primarily intended for the training of prospective summary trial presiding officers, junior officers below the rank of Capt/Lt(N) and non-commissioned members (NCMs) at or above the rank of Sgt/PO2 are permitted to undergo the POCT course for their own professional development. This training is particularly beneficial for senior NCMs who perform key roles in the maintenance of discipline within their units. As noted in Annex G, 27% of POCT participants were NCMs. This was the highest percentage participation by NCMs since the inception of the presiding officer training.

### *Presiding Officer Re-Certification Test (PORT)*

As reported above, Presiding Officer certifications are valid for four years from the date the officer initially attended the POCT course. Officers who wish to extend their certification or who need to renew an expired certification may do so in one of two ways. The preferred re-certification option for most officers is undergoing a 90-minute online re-certification test. This Presiding Officer Re-Certification Test (PORT) was launched in late 2003 and to date approximatley 650 officers have renewed their certifications in this fashion.

The second option for re-certifying is for the officer to re-attend the two-day POCT course. For some officers, particularly those who may not have performed presiding officer duties often or at all during the preceding four-year period, this is the preferred option. Re-attending POCT provides these officers with a full review of the entire disciplinary process at the summary trial level.

In the event an officer receives a failing grade after attempting the online PORT, the officer is permitted a re-test using different questions. In the event of a second failure, the officer is then required to re-attend the two-day POCT course in order to remain re-certified. While the on-line PORT is very convenient, some officers have opted to undergo the in-class POCT course as their preferred way to obtain their re-certification as presiding officers.

### *Other Military Justice Training*

All members of the CF are subject to the Code of Service Discipline (CSD). Regular force members are liable to be dealt with under military law for any CSD offence committed at any time during their entire period of military service, from enrolment to release from the CF. The application of the CSD to regular force and reserve force members differs somewhat. Regular force members are subject to the CSD at all times, regardless of whether they are on duty or off duty at the time of the offence, both inside and outside of Canada. Reserve force members are only liable under the CSD at times or in particular circumstances specified in the NDA, most typically when they are in uniform and performing military duties.

In order to ensure that CF members understand their rights, entitlements and obligations within the military justice system, instruction on the CSD is provided at numerous points in a military member's career. Recruits and officer candidates attending the CF Leadership and Recruit School receive classroom instruction on the CSD as part of the curriculum of their basic military training. Military justice training is also imbedded in a variety of "career courses" that CF members must complete to progress in their military occupations. Additional training is provided to those personnel who are responsible for carrying out particular functions in the administration of the military justice system — CF members who investigate alleged offences, who are authorized to lay charges, who are assigned as assisting officers or who review the pre-trial custody of CF members under military arrest.

Either legal officers or military instructors, depending on the level of training, deliver such on-going and progressive military justice training. Qualified instructors on the CF Leadership and Recruit School staff conduct military justice training during basic training and during other career courses at other CF schools. Other military justice training, particularly Presiding Officer Certification Training, is delivered by legal officers from the Office of the JAG.

The Office of the JAG also produces a number of publications and training aids related to military justice training. The main source of information on the summary trial process is the manual *Military Justice at the Summary Trial Level.*[3] Military members charged with a service offence and their assisting officers may also refer to the publication *Guide for Accused and Assisting Officers*[4] to inform themselves before making an election to have their charge dealt with before a court martial or by way of a summary trial. For the general information of all CF personnel, a question and answer format booklet entitled *The Code of Service Discipline and Me*[5] is available. Finally, persons who investigate and/or lay charges under the CSD have access to the brochure *Investigating and Charging.*[6] These training aids and publications are distributed at CF bases as well as during military justice instructional periods. All are available on-line from the JAG websites (Intranet and Internet).

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[3] Online: www.forces.gc.ca/jag/training/publications/POCTManual_e.asp.

### *Officer Professional Military Education (OPME) Military Law*

The Office of the JAG has, in cooperation with the Canadian Defence Academy, continued to improve the military justice component of the Officer Professional Military Education (OPME) program that all new CF officers must undergo as part of their professional military development. In 2004–2005 legal officers delivered eight on-site OPME Military Justice courses: five to naval officers at two venues — Halifax and Esquimalt, two courses for air force officers in St-Jean sur Richelieu and one course for army officers in Petawawa. In addition to their printed student materials, each OPME student who attended one of the on-site courses was provided with a new, updated, bilingual CD-ROM containing key reference materials relating to military justice, including the *National Defence Act, the Queen's Regulations & Orders* Volume 2 (Discipline), "*The Code of Service Discipline and Me*" information brochure and related Defence Administrative Orders and Directives (DAOD).

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[4] Online: www.forces.gc.ca/jag/training/publications/GuideAccusedAssistingOfficers(Bilingual).pdf.

[5] Online: www.forces.gc.ca/jag/training/publications/CSD_ME_e.pdf.

[6] Online: www.forces.gc.ca/jag/training/publications/charging_and_investigating_e.pdf.

### *Training and Education for Legal Officers*

Given that lawyers rarely have an opportunity to study military law at law school or during their respective bar admission courses, the Office of the JAG has a robust, progressive program to ensure the professional development of new legal officers. In the first phase or stage of their training, legal officers are required to undergo the presiding officer certification program. Legal officers are then expected to maintain their currency and certification by re-certifying at least every four years. In addition to various self-study packages and on-line tests, in their second phase of training, legal officers are required to participate in an on-the-job (OJT) training program that includes performing as junior counsel for either the prosecution or the defence at a court martial. Finally, as part of the third phase of legal officer training — legal officers attend a week-long Legal Officer Intermediate Training Military Justice course in order to develop their understanding of the military justice system at the court martial level.

### *Continuing Legal Education*

As in past years, in the 2004–2005 reporting year, the Office of the JAG played an active role in the Canadian Bar Association (CBA). Approximately one dozen legal officers attended the annual general meeting in Winnipeg in August 2004. In October 2004 the National Military Law Section of the CBA conducted its annual section meeting. The meeting was well attended by both military and civilian lawyers who share a general interest in military law and, for those civilian lawyers whose practices include defence counsel work at courts martial, a practical interest in military justice matters specifically.

Each year in the fall, the Office of the JAG conducts a two and a half day continuing legal education (CLE) workshop. While the themes of the workshops change from year to year, military justice issues are always allocated time on the workshop timetable. The military justice portion of this year's workshop in October 2004 focused on the departmental response to the first independent review by the Right Honourable Antonio Lamer of the Bill C-25 amendments to the *National Defence Act*, specifically those recommendations affecting the administration of military justice.

The training directorate of the Office of the JAG also supports participation in continuing legal education (CLE) for individual JAG officers by providing funds to attend courses, conferences, seminars and symposia dealing with justice issues, criminal law and advocacy training. For instance, in the 2004–2005 reporting period, a total of 42 JAG officers, regular and reserve, were sponsored to attend CLE on criminal law. The officers selected for such training are primarily those employed in the Canadian Military Prosecution Service, the Defence Counsel Services, the Directorate of Military Justice Policy and Research or they are posted to a JAG field office where they routinely provide legal advice to commanders and others responsible for unit discipline matters.

For selected officers, further education in the field of criminal law/military justice is sponsored by the Office of the JAG and the CF. Such post-graduate (PG) education provides legal officers with the opportunity to complete up to a year of subsidized, full-time study leading to a Masters of Laws (LL.M) degree. Immediately following completion of a PG degree relating to military justice, legal officers are typically posted into positions within the prosecution or defence counsel offices, or the military justice policy and research directorate.

### ***Communications & External Links***

The JAG website has continued to serve as a convenient and publicly accessible source for key military justice documents and recent statistics concerning both summary trials and courts martial. Legislation and regulations applicable to military justice are available online and for downloading, including the NDA and QR&O. Among the key links that the public may wish to access is the website of the Chief Military Judge (www.forces.gc.ca/cmj) which contains court martial schedules and other information. The main JAG link (www.forces.gc.ca/jag) has information on military justice both at the summary trial and courts martial levels, including the mandate of the JAG as superintendent responsible for the administration of the military justice system, the annual reports of the Director of Defence Counsel Services and Director of Military Prosecutions, an Assisting Officer training brochure and several military justice training publications. The Court Martial Appeal Court has its own website (www.cmac-cacm.ca).

## 3.7 Other Military Justice Initiatives

### Paralegal Occupation

The Office of the JAG continues to consider an initiative that would involve the creation of a paralegal occupation for non-commissioned members. The goal is to streamline the administration of military law by incorporating military paralegals into the JAG organization. Personnel for this occupation would be of the rank of sergeant/petty officer second-class to master warrant officer/chief petty officer second-class and could be selected from any military occupation. Candidates would attend paralegal training at a community college, and upon graduation, would be employed to assist military legal officers in all aspects of military law, including military justice. During the reporting period, a new draft paper was prepared which is currently being circulated for final comments within the JAG branch. When complete, the final paper will be sent to the Military Occupational Structure Analysis Redesign and Tailoring Project (MOSART) for review.

### Electronic Publication and Notification of QR&O

The JAG Internal Review Team (JIRT) has explored the development of official electronic publication and notification of the QR&Os during the reporting period. Currently, the only official version of the QR&Os is published in paper format and distributed to CF units by the Directorate of Technical Information and Codification Services.[7] Distribution by such paper means is time consuming and resource intensive. It can result in less than prompt dissemination of regulatory amendments to CF members. In order to more efficiently meet the statutory requirements of proper notification and publication of regulations, orders and instructions to members of the CF, the JIRT has discussed this issue with federal and provincial legislative counsel offices and studied the electronic publication of statutes and regulations in federal and provincial jurisdictions. Based on this research, a proposal for a CF model has been developed which could ultimately lead to the QR&Os being officially published on the DND intranet and Internet websites rather than in paper format.

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[7] An unofficial consolidated electronic version of the QR&Os is available on the Directorate Management Policy Development Internet site at: www.admfincs.forces.gc.ca/admfincs/subjects/qr_o/intro_e.asp.

The model includes a current official consolidated QR&O version in Portable Document Format (PDF) and a current unofficial Hypertext Mark-up Language (HTML) version. Additionally, historical versions of QR&Os would be available electronically in order for the user to determine the text of a regulation for a particular point in time. The goal is to have an accurate, efficient and legally enforceable mechanism for electronic publication and notification of QR&O to ensure that all CF members are able to have prompt access to current versions of orders and regulations governing their conduct and duties. The achievement of this goal is expected to increase institutional efficiency as well as to enhance the maintenance of discipline in the CF.

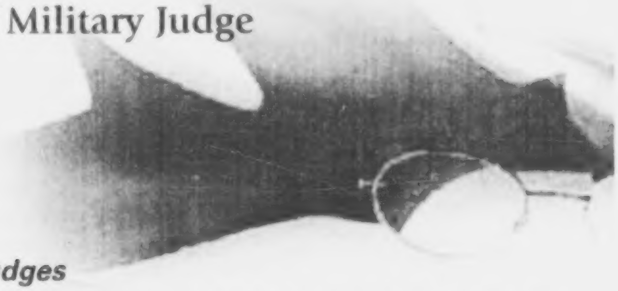
It is anticipated that the JIRT will further consult with staff from Assistant Deputy Minister (Finance and Corporate Services) and DND/CF LA early in the next reporting period in order to continue to develop this model. In addition, the JAG will brief the Military Justice Stakeholders' Committee on 2 May 2005 on the progress of this initiative. The Directorate of Management Policy Development will also conduct a feasibility study of the technical aspects of this proposal.

### *Visits*

The Office of the JAG hosted two military justice oriented visits during the reporting period. In October 2004, a delegation of Romanian military lawyers attended the JAG's annual Continuing Legal Education Workshop. The delegation consisted of Colonel Cornelia Buzincu, Deputy Director to the Legislation and Legal Counseling Directorate, Lieutenant Colonel Dan Cimpoeru, Chief of Trials Section, Legislation and Legal Counseling Directorate, and Mrs. Raluca Magdalena Leonte, Adviser to NGO Liaison Office, Legislation and Legal Counseling Directorate. The purpose of the visit was to discuss military justice jurisdiction issues as well as to broaden our common knowledge of foreign military justice systems. In February 2005, Professor Charles H.B. Garraway, Stockton Professor of International Law, Naval War College, Newport, RI was invited to give a lecture to the legal officers working in the National Capital Region. Professor Garraway's address was a unique opportunity for the professional development of both junior and senior legal officers with regards to international law, operational law, and military justice issues. His lecture mainly dealt with issues surrounding the negotiations that led to the adoption of the Statute of the Iraqi Special Tribunal.

# CHAPTER 4

# The Office of the Chief Military Judge



## 4.1 Military Judges

The Governor in Council may appoint any officer who is a barrister or advocate of at least 10 years standing at the bar of a province to the military judiciary.[1] A process similar to that followed for other federal judicial appointments ensures that only competent, deserving officers are considered for military judicial appointments.

## 4.2 Military Judges Selection Process

The Military Judges Selection Committee (MJSC) is responsible for preparing a list of potential candidates to become military judges. Members of the MJSC are appointed by the Minister of National Defence to represent the bench, the civilian bar and the military community.[2] To be considered for judicial appointment, qualified officers are assessed on their professional competence and experience, personal characteristics, social awareness, and any potential impediments to appointment.

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[1] NDA section 165.21(1).

[2] The Committee is composed of a lawyer or judge nominated by the Judge Advocate General, a civilian lawyer nominated by the Canadian Bar Association, a civilian judge nominated by the Chief Military Judge, an officer holding the rank of major-general or higher and a chief warrant officer or chief petty officer first class nominated by the Chief of Defence Staff.

All MJSC proceedings and consultations are confidential. As each candidate's assessment is completed, the MJSC is asked to rate the candidate as "recommended," "highly recommended" or "unable to recommend." The assessment is then forwarded to the Minister of National Defence who is responsible for recommending candidates to the Governor in Council when the need arises.

Completed assessments are valid for a period of three years. The previous assessment expired and the MJSC is in the process of creating a new list which should be finalized during the next reporting period.

### *4.3 Military Judges Compensation*

As noted in last year's Annual Report, the Military Judges Compensation Committee (MJCC) is established in regulations to conduct an inquiry into the remuneration of military judges every four years.[3] Judicial decisions of the Supreme Court of Canada[4] and the Court Martial Appeal Court[5] have declared that an independent process is needed and in fact is constitutionally mandated to guarantee the independence of the judiciary. The Committee consists of three part-time members appointed by the Governor in Council: the Honourable Claire L'Heureux-Dubé, Q.C. (nominated by the Military Judges), Dr. Ian Clark (nominated by the Minister) and, the Honourable Peter Cory, Q.C. (Chairperson — nominated by the two other members).

In conducting its quadrennial inquiry, the MJCC is required by regulation to consider four factors:

- the prevailing economic conditions in Canada, including the cost of living, and the overall economic and current financial position of the federal government;
- the role of financial security of military judges in ensuring judicial independence;

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[3] QR&O articles 204.23–204.27.

[4] Ref. re: Remuneration of Judges of the Prov. Court of P.E.I.; Ref. re: Independence and Impartiality of Judges of the Prov. Court of P.E.I., [1997] 3 S.C.R. 3, *Genereux* v. *The Queen*, [1992] 1 S.C.R. 259.

[5] *R.* v. *Boivin*, [1998] 245 N.R. 341 (C.M.A.C.), *R.* v. *Lauzon* (1998), 8 Admin. L.R. (3d) 33 (C.M.A.C.).

- the need to attract outstanding officers as military judges; and,
- any other objective criteria that the Committee considers relevant. This last criterion entails consideration of relevant comparators to determine the appropriate level of compensation, such as the salaries of other judges.

In the course of its inquiry, the MJCC received extensive written submissions and heard oral submissions from counsel acting on behalf of the Military Judges and the Government. The MJCC delivered its 2004 Report on the Compensation of Military Judges[6] to the Minister on 31 May 2004. As prescribed in regulations, the Minister made the report readily available to the public by posting it on the Internet.[7]

The majority of the members accepted the Government's submission as to the appropriate level of remuneration and mechanism for determining annual adjustments, describing it as "a very sensible, fair and equitable basis both for calculating the annual salary for Military Judges and the appropriate annual increase of that salary until the next Review."[8] They recommended that:

- the salary of Military Judges be increased to a figure equivalent to the average of Provincial Court Judges salaries on 1 Sep 2003;
- the salary of the Chief Military Judge be increased to a figure which is 3% greater than that of the other military judges;
- the salaries of Military Judges be varied on 1 September of each subsequent year to reflect the average salaries of Provincial Court Judges of the ten provinces and of the two territories; and,
- the effective date for this increase in pay of the Military Judges be 1 September 2003.

The Minister accepted the recommendations of the majority report, which were subsequently implemented by Treasury Board regulation. [9]

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[6] Online: www.forces.gc.ca/site/reports/mjcc04/index_e.asp.

[7] QR&O article 204.27.

[8] Canada, *Report on the Compensation of the Military Judges*, Ottawa, Department of National Defence, 2004, section "Review of suggested comparators", subsection "Provincial Court Judges across Canada".

[9] QR&O article 204.22.

# CHAPTER 5

## Appeals from Courts Martial to the Court Martial Appeal Court of Canada and the Supreme Court of Canada

### *5.1 The CMAC Year in Review — 1 April 2004 to 31 March 2005*

Mr. Justice Edmond P. Blanchard of the Federal Court of Canada was sworn in as Chief Justice of the Court Martial Appeal Court (CMAC) at a ceremony in Ottawa on 14 January 2005.[1] It was a historic occasion as it was the first public ceremony to recognize the appointment of the Chief Justice of the Court Martial Appeal Court. Chief Justice Blanchard replaced Mr. Justice Barry L. Strayer who served the court as Chief Justice from 1994 until 2004.

The ceremony took place in the Federal Court of Canada Courtroom at the Supreme Court of Canada and was presided over by Mr. Justice Rouleau of the Federal Court of Canada. The ceremony, complete with military honour guard, brought together the profession of arms, the profession of law, the public service, the judiciary, and elected officials in recognizing the importance of the military justice system. Chief Justice Strayer and Chief Justice Blanchard were both honoured by many distinguished guests whose comments focused on their contributions to the advancement of military law.

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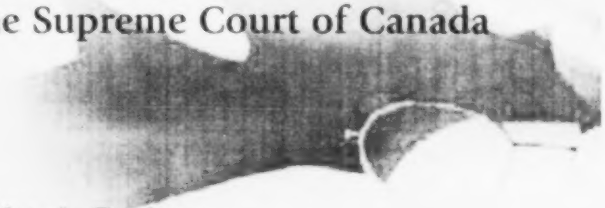
[1] Chief Justice Blanchard was appointed Chief Justice of the Court Martial Appeal Court on September 17, 2004.

# CHAPTER 5

## Appeals from Courts Martial to the Court Martial Appeal Court of Canada and the Supreme Court of Canada



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[1] Chief Justice Blanchard was appointed Chief Justice of the Court Martial Appeal Court on September 17, 2004.

### Military Justice Stakeholder's Committee

The Chief Justice of the CMAC also serves as Chairman of the Military Justice Stakeholders Committee. This committee, comprised of persons with a vested interest in the military justice system, serves as a forum for the general discussion of a wide variety of long-term military justice policy issues.

### Appeals

Five appeals were argued before the CMAC during the reporting period. The Supreme Court of Canada did not hear any appeals from the CMAC in 2004–2005.

Among the five appeals heard by the CMAC during the reporting period, in four cases, the appellant was a CF member convicted at court martial. Both legality of finding and quantum of the sentence were appealed in three of the cases. In the final case, the CF member pled guilty at court martial but appealed the legality and severity of his sentence. The Crown appeal related to a jurisdictional issue. CMAC results are also discussed at Annex F and in the report of the Director of Military Prosecutions at Annex J.

### Appeal Committee

A convicted person initiating an appeal may apply to the Appeal Committee for representation by legal counsel at public expense. This committee consists of a person appointed by the JAG and a person appointed by the Chief of the Defence Staff. When both members of the Appeal Committee determine that the applicant's appeal has "professional merit", the committee shall approve the provision of legal counsel by the Director of Defence Counsel Services.[2]

During the 2004–2005 reporting period, the Appeal Committee received five applications from persons seeking publicly funded legal counsel. After assessing the applications, the Committee found that there was professional merit in two of these cases.[3] It approved the provision of legal counsel by the DDCS for those appeals while denying the others.

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[2] QR&O article 101.21(6).

[3] These two cases had yet to be heard during the reporting period.

[4] *Scott* v. *R.*, [2004] CMAC-476.

## *5.2 CMAC Decisions*

### *Lieutenant (Navy) G.D. Scott* v. *The Queen*

On 22 November 2004, the CMAC allowed the appeal of Lieutenant (Navy) (Lt (N)) G.D. Scott[4] who had been convicted at court martial of disobedience of a lawful command contrary to section 83 of the *National Defence Act.* Lt (N) Scott had been given a severe reprimand and a fine of $3,000.00. The appellant appealed his conviction at court martial and also sought leave to appeal his sentence.

The facts in this case were not in dispute. Lt (N) Scott was ordered to attend a Division's parade at Canadian Forces Base Esquimalt on November 28, 2002. During the parade, the chaplain of the unit pronounced a short prayer that was followed by the playing of the naval hymn. Prior to the prayer, as was tradition, the parade was given the order to "remove headdress." Lt (N) Scott did not remove his headdress. At trial, Lt (N) Scott said that he did not comply with the order because he felt that his *Charter* right to freedom of religion had been violated by his enforced participation in a religious ceremony for which he did not believe.

The trial judge's verdict of guilty was predicated on the trial judge's finding that the order to remove headdress was a lawful command. The court found that the act of removing one's headdress before prayer does not signify adherence to religious belief but rather is a sign of respect which is required of all members of the Canadian Forces subject to such command.

The CMAC found that the trial judge's findings were unreasonable and were not supportable by the evidence. The CMAC found that it was clear that the order to remove headdress and the prayer that followed had religious connotations. All Canadian Forces members present had to at least appear to participate in the sentiments expressed. The court mentioned, however, that in some cases, military exigency might serve to justify the giving of orders that may result in *Charter* breaches. This was not such a case. The CMAC found that Lt (N) Scott's disobedience was justified as the order breached his *Charter* right to freedom of religion.[5]

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[5] Prior to his appeal, Lt (N) Scott applied to the Appeal Committee for financial assistance under QR&O 101.21. His application was refused. Since his appeal was successful, the CMAC awarded him costs on the same scale as if his application had been granted.

### ***The Queen*** **v.** ***Warrant Officer A.J. Brady***

On 3 December 2004 the CMAC dismissed the Crown's appeal in *Her Majesty the Queen* v. *Warrant Officer A.J. Brady*.[6] At trial, the judge terminated the case for lack of jurisdiction. He found that Warrant Officer (WO) Brady, a member on Class A Reserve Service, was not on duty at the time of the alleged offence and was therefore not subject to the Code of Service Discipline. The issue raised on appeal was the extent to which members on Class A Reserve status are subject to the military justice system when they perform military functions on a voluntary unpaid basis.

WO Brady was charged twice contrary to section 114, *National Defence Act*, "stealing, when entrusted by reason of his employment." He was also charged twice in the alternate to the *Criminal Code* charges under section 129, "Conduct to the Prejudice of Good Order and Discipline." The particulars of the charges allege that WO Brady used a DND Unit Acquisition Card to purchase computer software for his own personal use.

At the time of the alleged offence, WO Brady received no pay and was acting in his secondary role of stores-man on a voluntary basis. The Crown argued that because he was acting in his capacity as a military stores-man, albeit voluntarily, he should be considered "on duty" and thus subject to the Code of Service Discipline. The CMAC, however, agreed with the respondent's submissions finding that there are very specific criteria enumerated in NDHQ Instruction — ADM (PER) 2/93 to be satisfied in order for WO Brady to be on voluntary unpaid service and therefore "on duty." As he, by terms of the instruction, would not have been eligible for any of the benefits of "on duty" status, the CMAC concluded that the trial judge was correct in determining that WO Brady was not subject to the Code of Service Discipline at the time of the alleged incidents and therefore was not under the jurisdiction of the court.

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[6] *R.* v. *Brady*, [2004] CMAC-475.

***Officer Cadet J.A. McNulty* v. *The Queen***

On 28 January 2005, the CMAC dismissed the appeal of Officer Cadet (OCdt) Julian A. McNulty's[7] conviction for occasioning false alarm, contrary to section 75(g) of the *National Defence Act* and of his sentence of a severe reprimand and a fine of $10,000. The principal ground of appeal against conviction was the denial of effective counsel. In order to succeed, the appellant would have to prove that defence counsel's conduct constituted incompetence and that the result was a miscarriage of justice. The CMAC found that the appellant failed to discharge his onus of establishing denial of effective representation. The appeal against sentence also failed as the court opined that the sentence fit within the acceptable range for the offence.

***Private J.D. Dixon* v. *The Queen***

On 8 February 2005, the CMAC allowed in part the appeal of Private J.D. Dixon (Pte).[8] He had been convicted at court martial of possessing child pornography contrary to section 163.1(4) of the *Criminal Code*, charged under section 130 of the *National Defence Act*. The trial judge imposed a $5,000 fine and a seven-day suspended sentence. Pte Dixon appealed the legality of the finding and the severity of the sentence.

The appellant argued that the military judge erred in assessing the mental element for a finding of guilty when she concluded that he had actual knowledge that certain files on the computer contained child pornography or was wilfully blind as to the fact. The CMAC dismissed the appeal against finding stating that there was ample evidence to support the conviction.

In considering the appeal against sentence, the CMAC concluded that the gravity of the offence placed it towards the lower end of the spectrum of child pornographic offences. The CMAC also found that it was likely that the trial judge would have imposed a smaller fine had she not been told during the sentencing portion of the court martial that Pte Dixon would likely not be released from the Canadian Forces. The CMAC granted leave to appeal against the severity of the sentence and reduced the fine to $2,000.

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[7] *McNulty* v. *R.*, [2005] CMAC-480.

[8] *Dixon* v. *R.*, [2005] CMAC-477.

### *Trooper N.W. Lui* v. *The Queen*

On 11 February 2005, the CMAC allowed the appeal of Trooper (Tpr) N.W. Lui.[9] He had pleaded guilty at a Standing Court Martial of drawing a weapon against a superior officer, of unauthorized possession of a prohibited weapon and of using insulting language to a superior officer contrary respectively to sections 84, 130 and 85 of the *National Defence Act* and section 91(2) of the *Criminal Code*. Tpr Lui had been sentenced to imprisonment for a period of 45 days. An order authorizing the taking of a DNA sample[10] and a 10-year weapons prohibition order[11] were also issued. This prohibition extended to the appellant's military duty, which made his release from the Canadian Forces inevitable. The appellant appealed against both the legality and the severity of the sentence.

The CMAC found that the trial judge's findings concerning sentence were unreasonable and were not supportable by the evidence. The CMAC also found that the trial judge's finding failed to apply correctly the principle of parity in sentencing. It seems from the judicial precedents review made by the CMAC that detention has been preferred over imprisonment, even in more serious cases than the present instance. Furthermore, the CMAC found that the military judge emphasized deterrence at the expense of rehabilitation.

The CMAC substituted a period of detention for 45 days in place of the period of imprisonment, reduced the weapons prohibition order to a period of 2 years and deleted the application of the weapons prohibition to the appellant's duties as a member of the Canadian Forces. Had Tpr Lui not already served his period of incarceration, the CMAC mentioned that it would have ordered that the period of detention be suspended.

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[9] *Lui* v *R.*, [2005] CMAC-482.

[10] This order was issued pursuant to section 196.14 NDA.

[11] The order was issued pursuant to section 147.1 NDA.

# CHAPTER 6

## Conclusion

Military discipline, which is said to be the soul of armies, is the cornerstone of an effective and efficient military. As the superintendent of the administration of military justice in the Canadian Forces, I am confident that this 6th Annual Report clearly indicates that our military justice system is indeed providing the Canadian Forces with the necessary tools to maintain and enforce discipline in accordance with the rule of law.

This year's data and statistics show that service tribunals within the Canadian Forces are still being used at a steady state. At trials of first instance, the summary trial continues to be the predominant service tribunal used in the military justice system. An examination of this year's surveys and statistics demonstrates that the types of offences heard and punishments imposed at summary trial have remained essentially the same as compared to previous reporting periods. While the number of summary trials slightly decreased this year, the number of courts martial remained relatively constant. In fact, this year's number of courts martial actually represents the average number held over the past five years. A review of the types of courts martial conducted indicates that assaults, stealing and military specific offences such as disobedience of a lawful command, absence without leave, and conduct to the prejudice of good order and discipline have remained the most common offences. Statistics relating to rank and language of the accused, disposition by case, and punishments awarded at courts martial have shown relatively little change over time.

At the appellate level, the Court Martial Appeal Court laid the foundation by rendering fundamental decisions on *Charter* and jurisdictional issues during the reporting period. While the court reasserted the fact that the *Charter* applies to military orders and commands, it reaffirmed that consideration must be given to the concept of military necessity. Indeed, the court specifically recognized that military exigency might justify the giving of many orders that could otherwise result in *Charter* breaches. The court also provided specific guidance on long standing jurisdictional issues related to reserve force members.

We are continuously reviewing and improving the military justice system to ensure that it reflects current Canadian legal norms. During this reporting period, we conducted extensive policy analysis and consulted all military justice stakeholders before providing the Minister of National Defence with strategic advice regarding the military justice recommendations presented in the Lamer Report. While we are not yet in a position to describe in detail the exact nature of tomorrow's military justice system, we are confident that it will continue to foster discipline within the Canadian Forces.

In addition to the work accomplished towards reforming the *National Defence Act*, the Office of the JAG has also worked with other government departments to keep our military justice system in line with new legislative initiatives. Inter-governmental co-operation on Bill C-10 (Mental Disorder) and Bill C-13 (DNA Databank) are excellent examples where the NDA is being amended to ensure that those convicted of Code of Service Discipline offences at court martial are held to the same standard as the rest of Canadian society.

While we are continuously improving our military justice system through legislative reforms, we are also investing important resources on military justice education and training. Not only do we formally train officers presiding at summary trials, military justice training is imbedded in a variety of military career courses. Moreover, an increasing number of junior officers and non-commissioned members are requesting to attend the Presiding Officer Certification Training for professional development purposes. Such training can only increase confidence in the military justice system by making it more understandable to a broader range of individuals. Those persons receiving training are also certainly in better positions to fulfill their specific roles and mandates in the administration of the Code of Service Discipline, thus instilling confidence in the persons accused and brought to trial whether by summary trial or court martial.

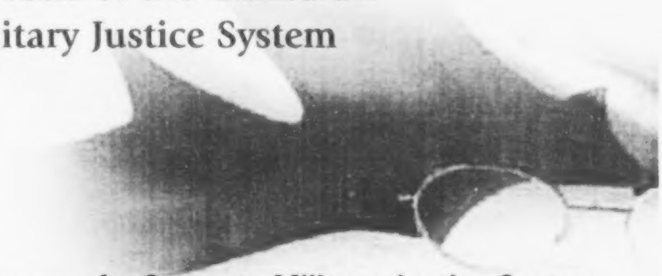
In summary, the wide use of service tribunals demonstrates the chain of command's ability and willingness to enforce discipline within the Canadian Forces. Surveys indicate that those involved in the administration of the Code of Service Discipline are knowledgeable about their roles as well as competent to perform their duties. Statistics also show that accused persons and those mandated to assist them have trust and confidence in the system. As stated by former Chief Justice Lamer in the foreword to his report of the First Independent Review, "Canada has developed a very sound and fair military justice framework in which Canadians can have trust and confidence."

# ANNEX A

## A Précis of the Canadian Military Justice System

# ANNEX A

## A Précis of the Canadian Military Justice System



### A.1 The Purpose of a Separate Military Justice System

In 1982, the *Canadian Charter of Rights and Freedoms (Charter)* expressly recognized the existence of a separate yet parallel system of military justice within the Canadian legal system. Subsection 11(f) of the *Charter* states that any person charged with an offence has the right to trial by jury "except in the case of an offence under military law tried before a military tribunal".

The Supreme Court of Canada has directly addressed the existence of a separate, distinct military justice system twice.[1] On both occasions, the court has upheld the requirement for a separate military justice system in the Canadian Forces (CF) (see sidebar).

### A.2 The Constitutional and Legislative Framework of the Canadian Military Justice System

Using its constitutional authority,[2] the Parliament of Canada enacted the *National Defence Act* (NDA), which, among its provisions, sets out the organization of the Department of National Defence (DND), the CF and the Canadian military justice system (including the establishment of courts martial and the court martial appeal court), and authorizes the Chief of the Defence Staff (CDS) to issue orders and instructions to give effect to the decisions and the directions of the Government of Canada and the Minister of National Defence.[3] The NDA authorizes the Governor in Council and the Minister of National Defence to make regulations for the organization, training, discipline, efficiency, administration and good government of the CF and, generally, for carrying the purposes and provisions of the NDA into effect. The NDA authorizes the creation of the *Queen's Regulations and Orders* (QR&O), Canadian Forces Administrative Orders (CFAO), and the Defence Administrative Orders and Directives (DAOD).

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[1] *MacKay* v. *The Queen,* [1980] 2 S.C.R. 370, and *R.* v. *Généreux,* [1992] 1 S.C.R. 259.

[2] *Constitution Act,* 1867, s. 91(7). Under the Canadian Constitution, the Parliament of Canada has exclusive authority to make laws relating to the "militia, military and naval service and defence". Consequently, Canadian constitutional law accords to the federal Parliament the right to make laws and regulations relating to military justice.

Volume II of QR&O, which covers disciplinary matters, prescribes in greater detail the jurisdiction, organization and procedures of the Canadian military justice system. Orders and instructions dealing with disciplinary matters may be issued at any level of the chain of command.[4] All members of the CF have a duty to be familiar with the orders and instructions issued by their chain of command.[5] Failure to comply with such orders and instructions can lead to

**Why does the Canadian Forces have its own justice system?**

In *R. v. Généreux*, [1992] 1 S.C.R. 259 at 293, the Supreme Court of Canada stated the rationale for keeping the military justice system distinct from the civilian criminal justice system:

*The purpose of a separate system of military tribunals is to allow the Armed Forces to deal with matters that pertain directly to the discipline, efficiency and morale of the military. The safety and well-being of Canadians depends considerably on the willingness and readiness of a force of men and women to defend against threats to the nation's security. To maintain the Armed Forces in a state of readiness, the military must be in a position to enforce internal discipline effectively and efficiently. Breaches of military discipline must be dealt with speedily and, frequently, punished more severely than would be the case if a civilian engaged in such conduct. As a result, the military has its own Code of Service Discipline to allow it to meet its particular disciplinary needs. In addition, special service tribunals, rather than ordinary courts, have been given jurisdiction to punish breaches of the Code of Service Discipline. Recourse to the ordinary criminal courts would, as a general rule, be inadequate to serve the particular disciplinary needs of the military. There is thus a need for separate tribunals to enforce special disciplinary standards in the military.*

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[3] NDA section 18(2).

[4] QR&O articles 4.12 and 4.21.

[5] QR&O articles 4.02 and 5.01.

charges under the Code of Service Discipline (contained in the NDA), which are disposed of in the military justice system.

Notwithstanding Parliament's authority to create and administer a military system of justice, the federal government is not immunized from complying with other constitutional laws, including the protections afforded by the *Charter*. As Canadian citizens, CF members are entitled to enjoy all the rights and freedoms guaranteed by the *Charter*.

## *A.3 The Military Justice System*

### *Code of Service Discipline*

Comprising approximately 50 percent of the NDA,[6] the Code of Service Discipline is the foundation of the Canadian military justice system. It sets out disciplinary jurisdiction and describes service offences, punishments, powers of arrest, and the organization and procedures for service tribunals, appeals and post-trial review.

### *Jurisdiction*

The Code of Service Discipline applies to all CF members and, in certain circumstances, to civilians who may become subject to Canadian military law, for example, when accompanying a CF unit on service or active service.[7]

Not all offences can be charged and tried in the military justice system.[8] The CF has no jurisdiction to try any person charged with having committed, in Canada, the offences of murder, manslaughter, or any offence under sections 280 to 283 of the *Criminal Code of Canada*.[9]

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[6] Pursuant to section 2 of the NDA, the Code of Service Discipline consists of Part III of the NDA.

[7] NDA section 60(1) and QR&O article 102.09. The complete list of persons subject to the Code of Service Discipline appears in sections 60–65 of the NDA and QR&O Chapter 102.

[8] NDA section 70.

[9] Sections 280–283 of the *Criminal Code* relate to the abduction of children from a parent or guardian.

When a person subject to the Code of Service Discipline commits an offence under the *Criminal Code* or other federal law, the NDA extends jurisdiction to deal with the matter in the military justice system.[10] Similarly, jurisdiction under the NDA may also be extended when an offence is committed contrary to foreign law.[11]

### *Service Offence*

A "service offence" is an offence under the NDA, the *Criminal Code* or any other act of Parliament committed by a person while subject to the Code of Service Discipline. The Code of Service Discipline also includes several service offences that are unique to the profession of arms,[12] such as: misconduct in the presence of the enemy, mutiny, disobedience of a lawful command, desertion, absence without leave, and conduct to the prejudice of good order and discipline.

### *Limitation Periods*

Generally, a person who is subject to the Code of Service Discipline at the time of the alleged commission of an offence continues to be liable to be charged, dealt with and tried at any time under the Code of Service Discipline.[13] This rule has two exceptions however. The first exception arises when the act or omission that constitutes the offence would have been subject to a limitation period had it been dealt with other than under the Code of Service Discipline; in such a case, that limitation period applies.[14] For example, if the act or omission constituted an offence under the *Criminal Code* or other federal or foreign law, then in this circumstance, any limitation period applicable to the offence in the civilian justice system applies. The second exception relates to summary trials. A summary trial must begin before one year has elapsed after the day when the offence is alleged to have been committed.[15]

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[10] Under section 130 of the NDA, such offences may become service offences.

[11] Under section 132 of the NDA, an offence committed by a person subject to the Code of Service Discipline under the law of a foreign country while outside Canada in that foreign country may also be dealt with as a service offence.

[12] NDA sections 73–129.

[13] NDA sections 60(2) and 69.

[14] NDA section 69(a).

[15] NDA section 69(b).

### *Process of Laying Charges*

Where a complaint is made or where there are other reasons to believe that a service offence may have been committed, an investigation shall be conducted to determine whether there are sufficient grounds to lay a charge.[16] A complaint can usually be directed to a commanding officer or to the Military Police.

### *Investigations*

Investigations can be conducted by one of three groups. The type of disciplinary investigation, and the entity responsible for it, is determined by the nature of the offence alleged and the gravity or sensitivity of the matter.

**Canadian Forces National Investigation Service (CFNIS) Investigation** — The CFNIS operates to provide independent criminal investigation services in support of the military justice system. It will investigate if an alleged offence is of a serious or sensitive nature. Any one of the following circumstances can bring a matter within the ambit of the "serious and sensitive" standard:

- when an offence is classified as indictable under the *Criminal Code* of Canada or other federal legislation;
- when a matter involves a senior officer (rank of major or above, or a civilian equivalent) or commanding officer as either the subject of investigation or victim; or
- when an offence arises out of a breached relationship of trust.

Moreover, when the CFNIS conducts an investigation, its investigators have the authority to lay charges.

**Military Police Investigation** — Where an alleged offence does not meet the serious or sensitive standard, or where the CFNIS has waived their jurisdiction, the Military Police will normally assume investigative responsibilities. Matters investigated by the Military Police will be referred to the person's unit for review and, where appropriate, the laying of charges.

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[16] QR&O article 106.02.

**Unit Investigation** — Alleged offences typically involving only a minor breach of discipline can be dealt with by way of unit investigation.

### *Investigation Process*

Regardless of the form of disciplinary investigation undertaken, an investigator shall, as a minimum, collect all reasonably available evidence bearing on the guilt or innocence of the person who is the subject of the investigation. Where appropriate, an investigation can involve:

- interviewing witnesses;
- taking statements;
- gathering physical evidence; and
- extending an opportunity to the subject of the investigation to make a statement.

The investigator may seek legal advice at any point during the investigation, but there is no obligation to do so.

### *Charging Process*

A "charge" is a formal accusation that a person subject to the Code of Service Discipline has committed a service offence. A charge is laid when it is reduced to writing in a Charge Report (Part I of a Record of Disciplinary Proceedings (RDP) form) and signed by a person authorized to lay charges.[17]

The following persons may lay charges under the Code of Service Discipline:

- a commanding officer;
- an officer or non-commissioned member authorized by a commanding officer to lay charges; and
- an officer or non-commissioned member of the Military Police assigned to investigative duties with the CFNIS.[18]

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[17] QR&O article 107.015(2).

[18] QR&O article 107.02.

To lay a charge there must be an actual belief on the part of the person laying a charge that the accused has committed the alleged offence and that belief must be reasonable. A "reasonable belief" is a belief that would lead any ordinary prudent and cautious person to the conclusion that the accused probably committed the offence alleged.[19]

### *Legal Advice*

Prior to laying a charge, the charge laying authority is required to obtain legal advice if:

- the charge cannot be tried summarily;
- the charge would give rise to a right to elect trial by court martial; or
- the offence is alleged to have been committed by an officer or non-commissioned member at or above the rank of warrant officer or petty officer first class.[20]

Legal advice at this stage in the process assists the charge laying authority in the exercise of charge laying discretion and as such is generally focused on whether or not the basic legal elements exist to allow the charge layer to form a reasonable belief that an offence has been committed. Advice will usually pertain to:

- the sufficiency of the evidence;
- whether or not the circumstances warrant a charge being laid; and
- the determination of an appropriate charge.

Where the CFNIS conducts an investigation, a prosecutor with the Canadian Military Prosecution Service (which is supervised by the Director of Military Prosecutions (DMP)) provides the necessary legal advice. In all other cases, the unit legal adviser provides legal advice.

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[19] See Note to QR&O article 107.02.

[20] QR&O article 107.03. Generally speaking, it is the rule rather than the exception to seek legal advice before laying charges. Effectively, legal advice must always be obtained, unless a person of or below the rank of sergeant or petty officer second class is to be charged with one of five minor offences listed in QR&O article 108.17.

Again, in all but the most minor of cases, legal advice must be sought from the unit legal adviser prior to making the decision of whether or not to proceed with a charge.[21] The commanding officer shall only proceed with charges if, in addition to having a reasonable belief that the accused committed the alleged offence, he or she is satisfied that there is sufficient evidence to put the accused on trial.

### *The Decision to Proceed with a Charge*

Once a charge has been laid, the charge laying authority must refer it to either:

- the accused person's commanding officer;
- the commanding officer of the base or unit in which the accused was present when the charge was laid; or
- another officer within the unit who has been authorized by the commanding officer to deal with charges under the Code of Service Discipline.[22]

An officer, to whom a charge has been referred, must then decide whether to proceed with the charge or not. A commanding officer or superior commander who decides not to proceed with a charge laid by the CFNIS must communicate that decision with reasons to the CFNIS.[23] If, after reviewing the decision and reasons, the CFNIS considers that the charge should go forward, the CFNIS may refer the charge directly to a referral authority for disposal, who must then refer the charge to the DMP.[24] When circumstances warrant, investigators of the Military Police and the CFNIS may also lay charges in the civilian courts.[25]

Where a commanding officer, superior commander, or officer with delegated powers decides to proceed with a charge, the charge shall be dealt with in accordance with the procedures prescribed by regulations contained in Volume II of QR&O. Ultimately, the CO can decide not to proceed with the charge, arrange for the accused to be tried by summary trial or refer the charge, which begins a process whereby the accused may consequently be tried by court martial.

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[21] QR&O article 107.11.

[22] QR&O article 107.09(1)(a).

[23] QR&O article 107.12(1).

[24] QR&O article 107.12(3).

[25] Where concurrent jurisdiction does exist, charges may be laid by military authorities under the Code of Service Discipline or in the civilian courts.

### *The Two Tiers of the Military Justice System*

The military justice system has a two-tiered tribunal structure that includes the summary trial system (where most disciplinary matters are dealt with) and the more formal court martial system. The term "service tribunal"[26] means either a summary trial or a court martial.[27] The regulations outline procedures for the trial of a matter by summary trial, as well as procedures for referral of charges for trial by court martial.

## *A.4 Summary Trials*

The summary trial remains the most commonly used form of service tribunal in the military justice system. The purposes of a summary trial are as follows:

- to provide prompt, fair justice in respect of minor service offences; and
- to contribute to the maintenance of military discipline and efficiency in Canada and abroad, in peacetime and during armed conflicts.[28]

Once jurisdiction exists to conduct a summary trial, [29] it may be held wherever the unit is located, whether it is in garrison, in an exercise area or deployed abroad. Generally, summary trials are conducted across Canada, at sea in Her Majesty's Canadian ships, and in various locations during operations abroad.

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[26] NDA section 2.

[27] For a detailed, comprehensive overview of the military justice system, see the JAG publication *Military Justice at the Summary Trial Level* (downloadable from www.forces.gc.ca/jag).

[28] QR&O article 108.02.

[29] Summary trial jurisdiction over an accused is not automatic; it depends on several statutory and regulatory factors including: fitness of the accused to be tried, the status and rank of the accused and of the presiding officer, the nature of the charges, the length of time elapsed between the laying of the charges and the first day of trial, the interests of justice and discipline, the nature of the punishment that may be imposed on the accused should a guilty finding be made and, if applicable, the election of the accused to be tried summarily. For a detailed consideration of jurisdiction, see NDA sections 60, 69, 70, 163 and 164; and QR&O articles 108.05, 108.06, 108.07, 108.09, 108.10, 108.12, 108.125, 108.16, 108.17 and 119.02.

When a CF member is charged with an offence under the Code of Service Discipline, the summary trial process usually permits the case to be tried and disposed of in the unit, by members of the unit. Summary trials are presided over by commanding officers,[30] delegated officers[31] or superior commanders.[32] Before conducting a summary trial, however, the presiding officer must (in most circumstances) be trained and certified in the administration of the Code of Service Discipline in accordance with the curriculum established and taught by the Directorate of Law/Training on behalf of the JAG.[33]

The procedures at a summary trial are straightforward and the powers of punishment are limited in scope. This restriction on the available punishments at summary trial reflects both the minor nature of the offences that may be tried at that level, and the intention that presiding officers impose punishments that are primarily corrective in nature.

During a summary trial, the accused is provided with an assisting officer from the unit. The primary functions of an assisting officer are to assist the accused in the preparation of his or her case and to assist the accused during the trial to the extent desired by the accused.

In addition, before the accused makes an election under article 108.17 *(Election To Be Tried by Court Martial)*, the assisting officer shall ensure that the accused is aware of the nature and gravity of any offence with which the accused has been charged and the differences between trial by court martial and trial by summary trial.

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[30] NDA section 163(1)(a). Commanding officers may try accused persons who are either an officer cadet or below the rank of warrant officer.

[31] NDA section 163(4) and QR&O 108.10. Delegated officers appointed by the commanding officer must be of the rank of captain or above. They may only try an accused below the rank of warrant officer, and may try only a limited number of minor offences.

[32] NDA section 164(1)(a). Superior commanders may try officers below the rank of lieutenant-colonel or non-commissioned members above the rank of sergeant.

[33] QR&O article 101.09; effective 1 April 2000-exceptions only for "urgent operational requirements."

Although the summary trial is still the overwhelmingly predominant form of service tribunal, not all service offences can be handled summarily. QR&O lists the offences that a commanding officer may try summarily.[34] The more serious offences, including most *Criminal Code* offences charged pursuant to section 130 of the NDA, must be tried by court martial.

### *Review of Summary Trials*

All offenders convicted at summary trial have the right to apply to the presiding officer's next superior officer in the disciplinary chain of command for a review of the findings, the punishment imposed,[35] or both.[36] The findings and punishment imposed at summary trial may also be reviewed on the independent initiative of a review authority.[37] Review authorities acting under QR&O article 108.45 must obtain legal advice before making any determination on requests for review.[38]

Offenders convicted at summary trial may also request judicial review from the Federal Court or from the Superior Court in any province or territory.[39]

## *A.5 Right to be Tried by Court Martial*

A significant aspect of the recent reforms was the expansion of the right of the accused to choose between summary trial and trial by court martial. Now, the accused has the right to elect trial by court martial in the vast majority of cases. In effect, the presiding officer must offer an election unless the accused is facing only a

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[34] QR&O article 108.07. See QR&O article 108.125 for offence jurisdiction for summary trial by superior commander, and QR&O article 108.10 for offence jurisdiction for summary trial by delegated officer.

[35] For a more detailed explanation of the powers of punishment in the summary trial system, see QR&O articles 108.24, 108.25 and 108.26.

[36] QR&O article 108.45.

[37] NDA section 249 and QR&O article 116.02.

[38] QR&O article 108.45(8).

[39] *Federal Courts Act*, R.S.C. 1985, c. F-7, sections 18 and 18.1.

"minor disciplinary" charge.[40] The QR&O specify when an accused has the right to elect to be tried by court martial, and under what circumstances an accused is not provided the option to choose. Generally, there are two instances where the option to choose is unavailable:

- where the charge laid is "minor" and in the judgement of the officer who will conduct the summary trial, any of the following penalties would not be appropriate upon a finding of guilt:
  - detention,
  - reduction in rank,
  - a fine in excess of 25 percent of monthly basic pay; and
- where the charge is for a serious offence under the Code of Service Discipline (e.g. negligent performance of duty, or some offences capable of being categorized as indictable under the *Criminal Code*) or the accused person is of the rank of lieutenant-colonel or higher, a trial by court martial is the only available option.

Where the accused has the right to be tried by court martial, the accused must be informed of that right. The accused must also be given a reasonable period of time to decide whether to elect to be tried by court martial, and to consult legal counsel with respect to the election.[41]

If a matter is to proceed by way of summary trial, in most circumstances the summary trial cannot be presided over by a commanding officer or superior commander who was also responsible for the investigation or laying of the charge for that particular accused.

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[40] "Minor disciplinary" charges resulting in a denial of the option to elect include the following sections of the NDA: 85 (insubordinate behaviour), 86 (quarrels and disturbances), 90 (absence without leave), 97 (drunkenness), or 129 (conduct to the prejudice of good order and discipline). When charges are laid under section 129, the right of election may be denied only when the offence relates to military training; maintenance of personal equipment, quarters or work space; or dress and deportment.

[41] QR&O articles 108.17 and 108.18. Legal officers of Defence Counsel Services are available to provide legal advice with respect to the making of the election. This service is provided at no expense to the accused, and is normally provided by telephone.

### *Referral to Court Martial*

When the type of charge requires trial by court martial, an accused has elected to be tried by court martial, or the commanding officer has determined that due to the nature of the offence the matter is most appropriately dealt with by court martial, the charge is referred to a referral authority. The term "referral authority" applies only to those specific officers who have been legally empowered to refer a charge to the DMP for the purposes of determining whether a matter warrants trial by court martial.

When making a referral to the DMP, a referral authority essentially represents the interests of the CF, which will be reflected in any recommendations accompanying a referred charge. Under the regulations, the following officers are referral authorities:

- the Chief of Defence Staff; and
- any officer having the powers of an officer commanding a command.

Upon receipt of an application to proceed with a charge, the referral authority must:

- forward the application to the DMP, adding any recommendations regarding the disposition of the charge that are deemed appropriate (including any recommendation to proceed or not proceed with a charge); or
- direct a commanding officer or superior commander to try the accused by summary trial on the existing charges, but only in circumstances where the referring officer had referred the charge because he or she believed his or her powers of punishment were not adequate to try the accused by summary trial and the referral authority does not share this opinion.

Thus in most cases, when a charge has been referred to a referral authority, he or she must forward the charge to the DMP, with any recommendations that the officer considers appropriate.

### *Role of DMP in Court Martial Process*

The DMP is responsible for:

- deciding whether a particular charge is suitable for trial by court martial; and
- conducting prosecutions at courts martial.

Upon receipt of a referral, the DMP initially undertakes a review of the charge. Two main issues are considered:

- the sufficiency of the evidence required to demonstrate a reasonable prospect of conviction in respect of the charges laid or yet to be laid; and
- where there is sufficient evidence, whether or not the public interest and the interests of the CF require the initiation of a prosecution.

Following a review of the charge, the DMP will determine whether or not a charge should be dealt with at court martial and will notify the referral authority, commanding officer, and the accused of this decision. Where it is decided not to proceed with the court martial, the DMP may refer the charge back to an officer having summary trial jurisdiction if:

- the offence is one which may be tried at summary trial; and
- the accused has not elected to be tried by court martial.

On the other hand, where the decision is made to pursue a charge, the DMP will prefer the charge by preparing and signing a charge sheet and refer the charge to the Court Martial Administrator, who will then convene a court martial. In addition, the DMP can modify charges or prefer any other charges supported by evidence.

### *A.6 Courts Martial*

The court martial, a formal military court presided over by a military judge, is designed to deal with more serious offences, and is conducted in accordance with rules and procedures similar to those followed in civilian criminal courts. Like summary trials, courts martial may be held anywhere in the world. Statutorily, courts martial have the same rights, powers and privileges as a superior court of criminal jurisdiction with respect to all "matters necessary or proper for the due exercise of its jurisdiction",[42] including: the attendance, swearing and examination of witnesses; the production and inspection of documents; and the enforcement of its orders.

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[42] NDA section 179.

At a court martial, the prosecution is conducted by a legal officer from the Office of the Director of Military Prosecution (DMP). The accused is entitled to be represented free of charge by a legal officer from the Directorate of Defence Counsel Services (DDCS)[43] or, at his or her own expense, by a civilian lawyer. CF members who meet the qualifying criteria may also take advantage of provincial Legal Aid programs.

***Types of Court Martial***

The NDA provides for four types of court martial:

- General Court Martial;
- Disciplinary Court Martial;
- Standing Court Martial; and
- Special General Court Martial.

The General Court Martial and the Disciplinary Court Martial each comprise a military judge and a panel of CF members. The panel of CF members is roughly analogous to a jury in a civilian criminal court. In a General Court Martial, the panel is composed of five members and in a Disciplinary Court Martial, the panel is composed of three members.[44] When the accused is an officer, the court martial panel consists entirely of officers. When the accused is a non-commissioned member, the panel at a General Court Martial must include two non-commissioned members at or above the rank of warrant officer or petty officer first class. The panel at the Disciplinary Court Martial of a non-commissioned accused must include one non-commissioned member at or above the rank of warrant officer or petty officer first class.[45] At both the General Court Martial and the Disciplinary Court Martial, the panel makes the finding on the charges (i.e. guilty or not guilty) and the military judge makes all legal rulings and imposes the sentence.

The Standing Court Martial and the Special General Court Martial differ in name and function, but not in composition; both are conducted by a military judge sitting alone,[46] who makes the finding on the charges and imposes a sentence if the accused is found guilty. The rank or status of the accused, the nature of the offence, and the powers of punishment available to the various types of court martial are all factors considered in determining which type of court martial is appropriate in a specific case.

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[43] QR&O article 101.20.

[44] NDA sections 167(1) and 170(1).

[45] NDA sections 167(7) and 170(4).

[46] NDA sections 174 and 177.

### *Appeal of a Court Martial Decision*

Generally speaking, decisions made at courts martial may be appealed to the Court Martial Appeal Court of Canada (CMAC), a civilian court composed of Federal Court and Superior Court judges.[47] The CMAC may sit and hear appeals at any place.

Under the NDA, both an accused tried by court martial and the Minister of National Defence may appeal to the CMAC.

CMAC decisions may be appealed to the Supreme Court of Canada. Such appeals may be made on any question of law on which a judge of the CMAC dissents, or on any question of law if leave to appeal is granted by the Supreme Court of Canada.[48]

When a person has delivered a Notice of Appeal under section 230 or 245 of the NDA, he or she may apply to the Appeal Committee, established by the Governor in Council through regulation,[49] to be represented on the appeal, free of charge, by a lawyer appointed by the DDCS. When both members of the Appeal Committee determine that the applicant's appeal has professional merit, the committee shall approve the provision of legal counsel by the DDCS.[50]

Before the establishment of the Appeal Committee, only accused persons who were respondents to appeals filed by the Crown were entitled to be represented by a legal officer at public expense.[51] This regulatory provision now extends the same opportunity to persons initiating an appeal which is determined to have professional merit.

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[47] NDA sections 159.9, 234, 235, 238 to 243 and 248.2 to 248.9.

[48] NDA section 245.

[49] QR&O article 101.21.

[50] QR&O article 101.21(6).

[51] QR&O article 101.20(2)(g).

### *Ancillary Repercussions to a Member's Career*

Apart from potential disciplinary action or penal sanctions under the Code of Service Discipline, administrative action may also be initiated by the chain of command.

When a CF member is faced with a charge under the Code of Service Discipline, a commanding officer must consider the consequences of leaving the accused in the workplace, or relieving him or her of the obligation to perform military duties. Whatever administrative course of action is contemplated, it must be appropriate, taking into account: the specific offence, the circumstances of the accused, the best interests of the unit, and the operational requirements of the CF as a whole. In essence, the rights of the individual involved must be weighed against the public interest.

When administrative measures are temporary in nature, a member's status will be re-evaluated once military justice proceedings are concluded. Depending upon the circumstances, however, long-term administrative measures may be imposed after a final disposition of the charges. Such measures can range from recorded warnings or counselling and probation, to the most serious measure, release from the CF.

## *A.7 Public Access to Charging Documents*

The CF has a process similar to that used by civilian criminal courts to permit public access to the charging documents in the Unit Registry of Disciplinary Proceedings. Under the civilian court system, registries supply basic charging documents to requesters who give the registry staff sufficient information to identify the record sought.

Each CF unit is required to establish and maintain a Unit Registry of Disciplinary Proceedings.[52] Anyone can request a copy of a specific Record of Disciplinary Proceedings (RDP) by sending the commanding officer of the originating unit a written request containing sufficient information to allow the RDP to be identified (e.g., a specific type of offence, or the name of an accused). Upon receipt of such a request, the commanding officer must send the requester a copy of the RDP held on the unit's Registry of Disciplinary Proceedings, unless release of the RDP is prohibited for one of the reasons set out in the regulation.[53]

This streamlined process is designed to increase public access to the basic charging documents and key decisions in the military justice system. This material is also available through the *Access to Information Act* process, which must be used when the requester lacks sufficient identifying information or the commanding officer is prohibited from releasing the RDP for a reason set out in the regulation.

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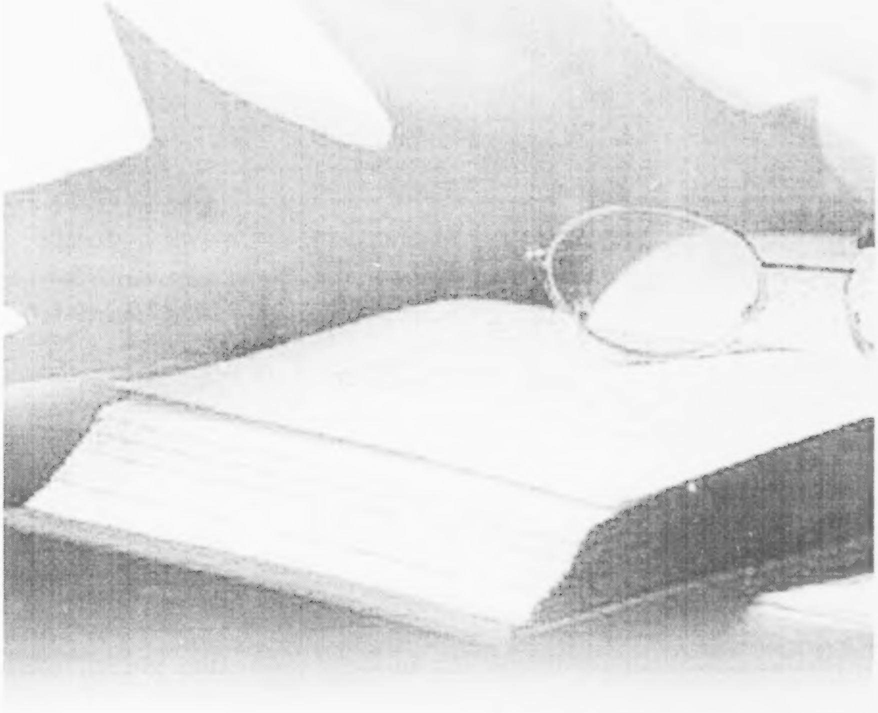
[52] QR&O article 107.14.

[53] QR&O article 107.16.

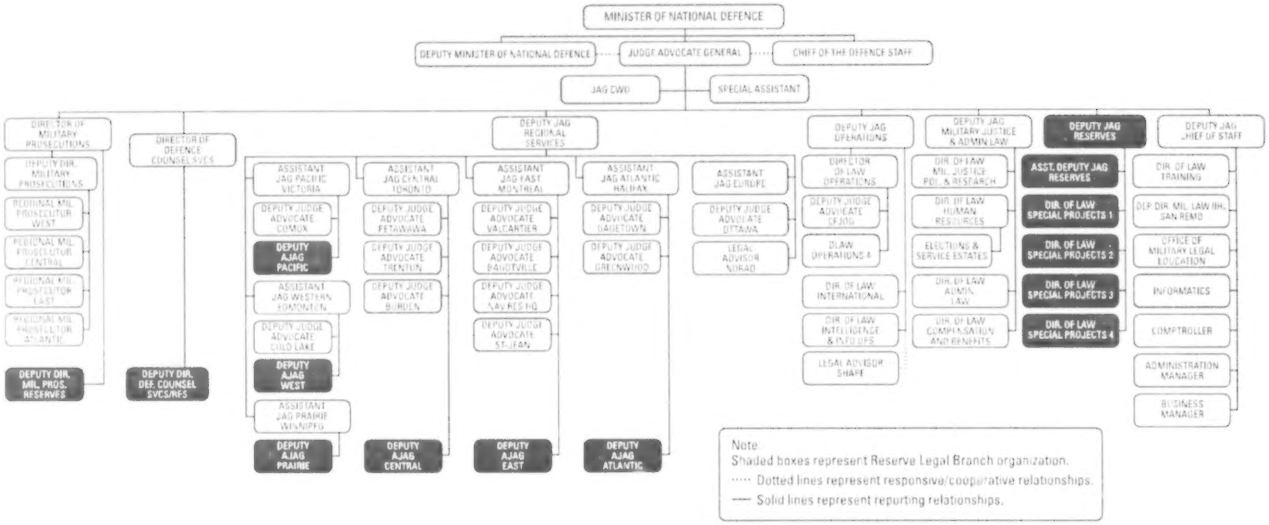
# ANNEX B

## Organization Chart of the Office of the Judge Advocate General

## Maps and Addresses/Phone Numbers of Judge Advocate General Offices

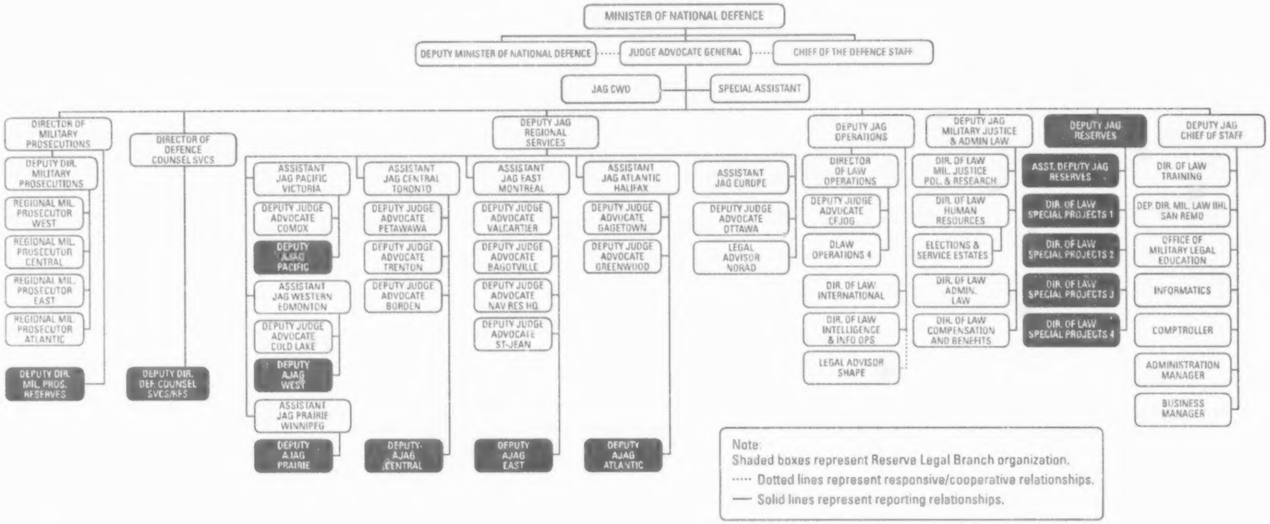


# Regular and Reserve Force Offices
# (as of 1 April 2005)


MINISTER OF NATIONAL DEFENCE
DEPUTY MINISTER OF NATIONAL DEFENCE
JUDGE ADVOCATE GENERAL
CHIEF OF THE DEFENCE STAFF
JAG CWO
SPECIAL ASSISTANT
DIRECTOR OF MILITARY PROSECUTIONS
DEPUTY DIR. MILITARY PROSECUTIONS
REGIONAL MIL. PROSECUTOR WEST
REGIONAL MIL. PROSECUTOR CENTRAL
REGIONAL MIL. PROSECUTOR EAST
REGIONAL MIL. PROSECUTOR ATLANTIC
DEPUTY DIR. MIL. PROS. RESERVES
DIRECTOR OF DEFENCE COUNSEL SVCS
DEPUTY DIR. DEF. COUNSEL SVCS/RES
DEPUTY JAG REGIONAL SERVICES
ASSISTANT JAG PACIFIC VICTORIA
DEPUTY JUDGE ADVOCATE COMOX
DEPUTY AJAG PACIFIC
ASSISTANT JAG WESTERN EDMONTON
DEPUTY JUDGE ADVOCATE COLD LAKE
DEPUTY AJAG WEST
ASSISTANT JAG PRAIRIE WINNIPEG
DEPUTY AJAG PRAIRIE
ASSISTANT JAG CENTRAL TORONTO
DEPUTY JUDGE ADVOCATE PETAWAWA
DEPUTY JUDGE ADVOCATE TRENTON
DEPUTY JUDGE ADVOCATE BORDEN
DEPUTY AJAG CENTRAL
ASSISTANT JAG EAST MONTREAL
DEPUTY JUDGE ADVOCATE VALCARTIER
DEPUTY JUDGE ADVOCATE BAGOTVILLE
DEPUTY JUDGE ADVOCATE NAV RES HQ
DEPUTY JUDGE ADVOCATE ST-JEAN
DEPUTY AJAG EAST
ASSISTANT JAG ATLANTIC HALIFAX
DEPUTY JUDGE ADVOCATE GAGETOWN
DEPUTY JUDGE ADVOCATE GREENWOOD
DEPUTY AJAG ATLANTIC
ASSISTANT JAG EUROPE
DEPUTY JUDGE ADVOCATE OTTAWA
LEGAL ADVISOR NORAD
DEPUTY JAG OPERATIONS
DIRECTOR OF LAW OPERATIONS
DEPUTY JUDGE ADVOCATE CFJOG
DLAW OPERATIONS 4
DIR. OF LAW INTERNATIONAL
DIR. OF LAW INTELLIGENCE & INFO OPS
LEGAL ADVISOR SHAPE
DEPUTY JAG MILITARY JUSTICE & ADMIN LAW
DIR. OF LAW MIL. JUSTICE POL. & RESEARCH
DIR. OF LAW HUMAN RESOURCES
ELECTIONS & SERVICE ESTATES
DIR. OF LAW ADMIN. LAW
DIR. OF LAW COMPENSATION AND BENEFITS
DEPUTY JAG RESERVES
ASST. DEPUTY JAG RESERVES
DIR. OF LAW SPECIAL PROJECTS 1
DIR. OF LAW SPECIAL PROJECTS 2
DIR. OF LAW SPECIAL PROJECTS 3
DIR. OF LAW SPECIAL PROJECTS 4
DEPUTY JAG CHIEF OF STAFF
DIR. OF LAW TRAINING
DEP DIR. MIL. LAW IIHL SAN REMO
OFFICE OF MILITARY LEGAL EDUCATION
INFORMATICS
COMPTROLLER
ADMINISTRATION MANAGER
BUSINESS MANAGER

Note:
Shaded boxes represent Reserve Legal Branch organization.
····· Dotted lines represent responsive/cooperative relationships.
—— Solid lines represent reporting relationships.

## Regular and Reserve Force Offices
## (as of 1 April 2005)


MINISTER OF NATIONAL DEFENCE
DEPUTY MINISTER OF NATIONAL DEFENCE
JUDGE ADVOCATE GENERAL
CHIEF OF THE DEFENCE STAFF
JAG CWO
SPECIAL ASSISTANT
DIRECTOR OF MILITARY PROSECUTIONS
DEPUTY DIR. MILITARY PROSECUTIONS
REGIONAL MIL. PROSECUTOR WEST
REGIONAL MIL. PROSECUTOR CENTRAL
REGIONAL MIL. PROSECUTOR EAST
REGIONAL MIL. PROSECUTOR ATLANTIC
DEPUTY DIR. MIL. PROS. RESERVES
DIRECTOR OF DEFENCE COUNSEL SVCS
DEPUTY DIR. DEF. COUNSEL SVCS/RES
DEPUTY JAG REGIONAL SERVICES
ASSISTANT JAG PACIFIC VICTORIA
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DEPUTY AJAG PRAIRIE
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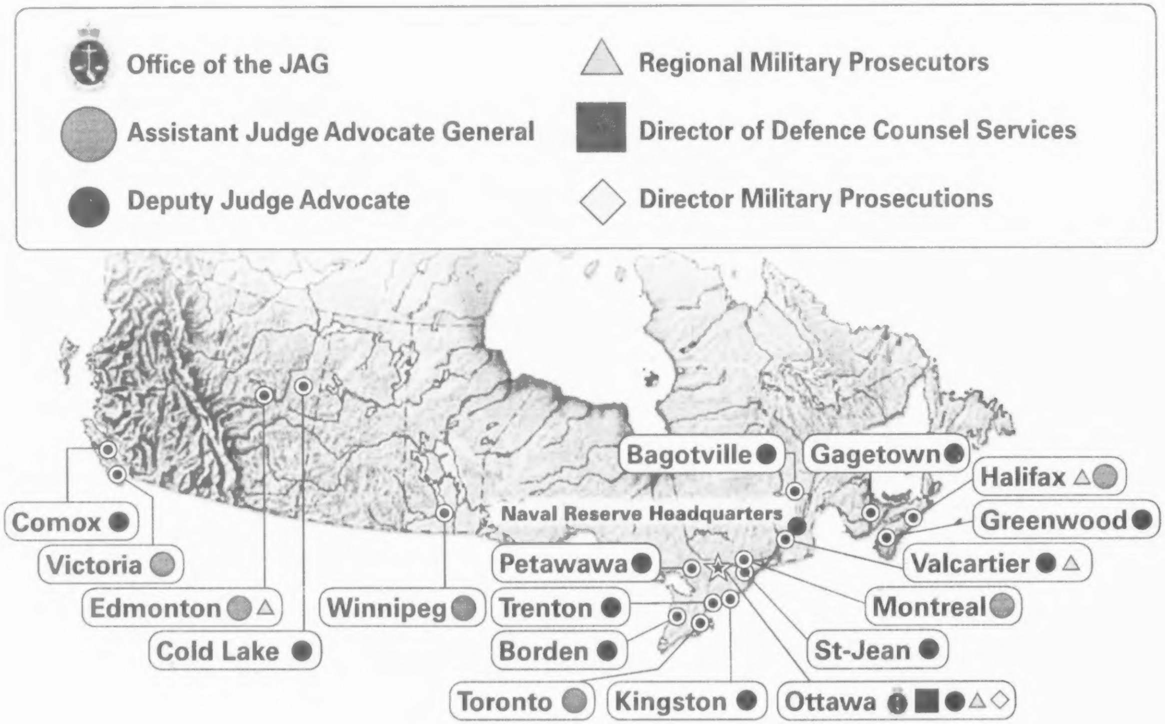
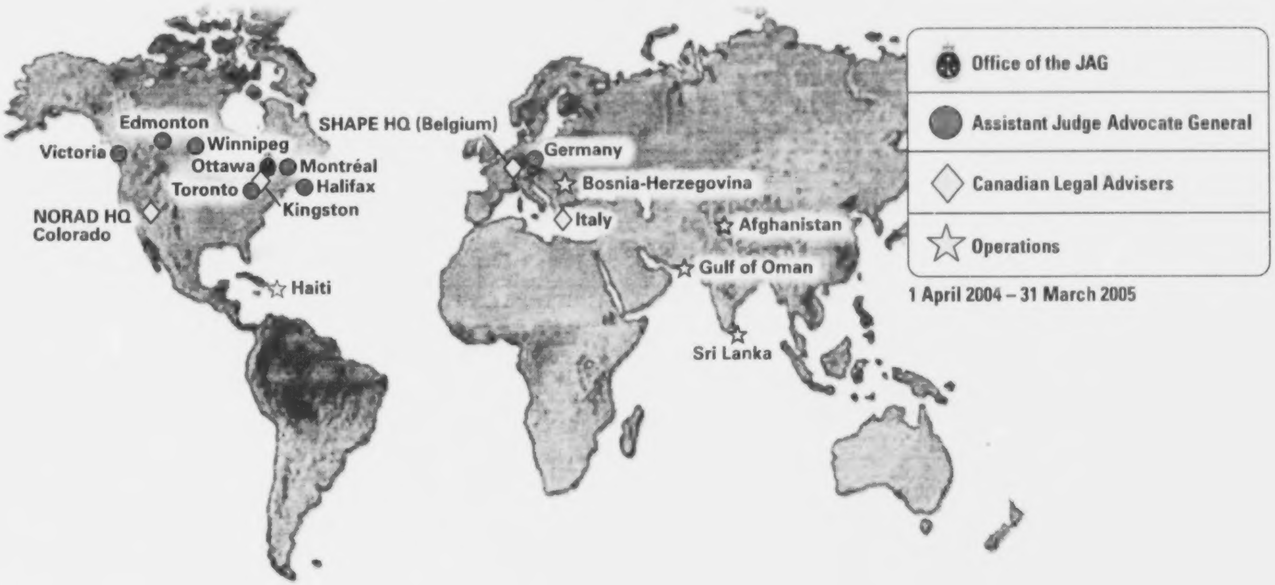
DEPUTY JUDGE ADVOCATE GREENWOOD
DEPUTY AJAG ATLANTIC
ASSISTANT JAG EUROPE
DEPUTY JUDGE ADVOCATE OTTAWA
LEGAL ADVISOR NORAD
DEPUTY JAG OPERATIONS
DIRECTOR OF LAW OPERATIONS
DEPUTY JUDGE ADVOCATE CFJOG
DLAW OPERATIONS 4
DIR. OF LAW INTERNATIONAL
DIR. OF LAW INTELLIGENCE & INFO OPS
LEGAL ADVISOR SHAPE
DEPUTY JAG MILITARY JUSTICE & ADMIN LAW
DIR. OF LAW MIL. JUSTICE POL. & RESEARCH
DIR. OF LAW HUMAN RESOURCES
ELECTIONS & SERVICE ESTATES
DIR. OF LAW ADMIN. LAW
DIR. OF LAW COMPENSATION AND BENEFITS
DEPUTY JAG RESERVES
ASST. DEPUTY JAG RESERVES
DIR. OF LAW SPECIAL PROJECTS 1
DIR. OF LAW SPECIAL PROJECTS 2
DIR. OF LAW SPECIAL PROJECTS 3
DIR. OF LAW SPECIAL PROJECTS 4
DEPUTY JAG CHIEF OF STAFF
DIR. OF LAW TRAINING
DEP. DIR. MIL. LAW IHL SAN REMO
OFFICE OF MILITARY LEGAL EDUCATION
INFORMATICS
COMPTROLLER
ADMINISTRATION MANAGER
BUSINESS MANAGER

Note:
Shaded boxes represent Reserve Legal Branch organization.
····· Dotted lines represent responsive/cooperative relationships.
— Solid lines represent reporting relationships.

## Canadian Offices of the Judge Advocate General


Office of the JAG
● Assistant Judge Advocate General
● Deputy Judge Advocate
△ Regional Military Prosecutors
■ Director of Defence Counsel Services
◇ Director Military Prosecutions
Comox ●
Victoria ●
Edmonton ● △
Cold Lake ●
Winnipeg ●
Bagotville ●
Naval Reserve Headquarters ●
Petawawa ●
Trenton ●
Borden ●
Toronto ●
Kingston ●
Gagetown ●
Halifax △ ●
Greenwood ●
Valcartier ● △
Montreal ●
St-Jean ●
Ottawa ■ ● △ ◇

## World Offices of the Judge Advocate General


Edmonton
Winnipeg
Victoria
Ottawa
Montréal
Toronto
Halifax
Kingston
NORAD HQ
Colorado
Haiti
SHAPE HQ (Belgium)
Germany
Bosnia-Herzegovina
Italy
Afghanistan
Gulf of Oman
Sri Lanka
Office of the JAG
Assistant Judge Advocate General
Canadian Legal Advisers
Operations

1 April 2004 – 31 March 2005

## Addresses/Phone Numbers of Judge Advocate General Offices

| Mailing Address | Telephone/Fax Numbers |
|---|---|
| Office of the Judge Advocate General<br>Constitution Building<br>National Defence Headquarters<br>101 Colonel By Drive<br>Ottawa ON K1A 0K2 | TEL: (613) 992-3019<br>CSN: 842-3019<br>FAX: (613) 995-3155 |
| Special Assistant<br>Office of the Judge Advocate General<br>MGen George R. Pearkes Building<br>National Defence Headquarters<br>101 Colonel By Drive<br>Ottawa ON K1A 0K2 | TEL: (613) 996-8470<br>CSN: 846-8470<br>FAX: (613) 992-5678 |
| Director of Military Prosecutions<br>Constitution Building<br>National Defence Headquarters<br>101 Colonel By Drive<br>Ottawa ON K1A 0K2 | TEL: (613) 996-5723<br>CSN: 846-5723<br>FAX: (613) 995-1840 |
| Director of Defence Counsel Services<br>Asticou Centre, Block 1900<br>National Defence Headquarters<br>101 Colonel By Drive<br>Ottawa ON K1A 0K2 | TEL: (819) 994-9151<br>CSN: 844-9151<br>FAX: (819) 997-6322 |
| Deputy Judge Advocate<br>General/Chief of Staff<br>Constitution Building<br>National Defence Headquarters<br>101 Colonel By Drive<br>Ottawa ON K1A 0K2 | TEL: (613) 992-8414<br>CSN: 842-8414<br>FAX: (613) 995-3155 |
| Deputy Judge Advocate<br>General/Operations<br>Constitution Building<br>National Defence Headquarters<br>101 Colonel By Drive<br>Ottawa ON K1A 0K2 | TEL: (613) 996-4812<br>CSN: 846-4812<br>FAX: (613) 995-5737 |

| Mailing Address | Telephone/Fax Numbers |
|---|---|
| Deputy Judge Advocate General/<br>Military Justice and Administrative Law<br>Constitution Building<br>National Defence Headquarters<br>101 Colonel By Drive<br>Ottawa ON K1A 0K2 | TEL: (613) 995-2628<br>CSN: 845-2628<br>FAX: (613) 995-5737 |
| Deputy Judge Advocate General/<br>Regional Services<br>MGen George R. Pearkes Building<br>National Defence Headquarters<br>101 Colonel By Drive<br>Ottawa ON K1A 0K2 | TEL: (613) 996-6456<br>CSN: 845-6456<br>FAX: (613) 992-5678 |

**Alberta**

| Mailing Address | Telephone/Fax Numbers |
|---|---|
| Assistant Judge Advocate General<br>Western Region<br>P.O. Box 10500 Stn Forces<br>Edmonton AB T5J 4J5 | TEL: (780) 973-4011 EXT 4239<br>CSN: 528-4239<br>FAX: (780) 973-1409 |
| Regional Military Prosecutor<br>Western Region<br>P.O. Box 10500 Stn Forces<br>Edmonton AB T5J 4J5 | TEL: (780) 973-4011<br>EXT 4771/4779<br>CSN: 528-4771<br>FAX: (780) 973-1649 |
| Deputy Judge Advocate<br>4 Wing Cold Lake<br>P.O. Box 6550 Stn Forces<br>Cold Lake AB T9M 2C6 | TEL: (780) 840-8000 EXT 7027<br>CSN: 690-7027<br>FAX: (780) 840-7328 |

**British Columbia**

| Mailing Address | Telephone/Fax Numbers |
|---|---|
| Assistant Judge Advocate General<br>Pacific Region<br>P.O. Box 17000 Stn Forces<br>Victoria BC V9A 7N2 | TEL: (250) 363-4260<br>CSN: 255-4260<br>FAX: (250) 363-5619 |
| Deputy Judge Advocate<br>19 Wing Comox<br>PO Box 1000, Stn Main<br>Lazo BC V0R 2K0 | TEL: (250) 339-8153<br>CSN: 252-8153<br>FAX: (250) 339-8015 |

## Manitoba

| Mailing Address | Telephone/Fax Numbers |
|---|---|
| Assistant Judge Advocate General<br>Prairie Region<br>1 Cdn Air Div HQ<br>P.O. Box 17000 Stn Forces<br>Winnipeg MB R3J 3Y5 | TEL: (204) 833-2500 EXT 5900<br>CSN: 257-5900<br>FAX: (204) 833-2593 |

## New Brunswick

| Mailing Address | Telephone/Fax Numbers |
|---|---|
| Deputy Judge Advocate<br>3 Area Support Group Gagetown<br>P.O. Box 17000 Stn Forces<br>Oromocto NB E2V 4J5 | TEL: (506) 422-2000 EXT 2310<br>CSN: 432-2310<br>FAX: (506) 422-1452 |

## Nova Scotia

| Mailing Address | Telephone/Fax Numbers |
|---|---|
| Assistant Judge Advocate General<br>Atlantic Region<br>P.O. Box 99000 Stn Forces<br>Halifax NS B3K 5X5 | TEL: (902) 427-7300<br>CSN: 427-7300<br>FAX: (902) 427-7199 |
| Regional Military Prosecutor<br>Atlantic Region<br>P.O. Box 99000 Stn Forces<br>Halifax NS B3K 5X5 | TEL: (902) 427-7318<br>CSN: 427-7318<br>FAX: (902) 427-7317 |
| Deputy Judge Advocate<br>14 Wing Greenwood<br>P.O. Box 5000 Stn Main<br>Greenwood NS B0P 1N0 | TEL: (902) 765-1494 EXT 5623<br>CSN: 568-5623<br>FAX: (902) 765-1287 |

## Ontario

| Mailing Address | Telephone/Fax Numbers |
|---|---|
| Assistant Judge Advocate General<br>Central Region<br>P.O. Box 5000<br>Toronto ON M3M 3J5 | TEL: (416) 633-6200 EXT 3955<br>CSN: 634-3955<br>FAX: (416) 635-2726 |

| Ontario (continued) | |
|---|---|
| **Mailing Address** | **Telephone/Fax Numbers** |
| Regional Military Prosecutor<br>Central Region<br>National Defence Headquarters<br>Constitution Building<br>101 Colonel By Drive<br>Ottawa ON K1A 0K2 | TEL: (613) 996-2745<br>CSN: 846-2745<br>FAX: (613) 995-1840 |
| Deputy Judge Advocate<br>Canadian Forces Base Borden<br>P.O. BOX 1000 Stn Main<br>Borden ON L0M 1C0 | TEL: (705) 424-1200 EXT 3508<br>CSN: 270-3508<br>FAX: (705) 423-3003 |
| Legal Adviser<br>Canadian Forces Joint Operations Group<br>Canadian Forces Base Kingston<br>P.O. BOX 17000 Stn Forces<br>Kingston ON K7K 7B4 | TEL: (613) 541-5010 EXT 4360<br>CSN: 271-4360<br>FAX: (613) 540-8186 |
| Deputy Judge Advocate<br>Canadian Forces Base Petawawa<br>Building S111<br>P.O. BOX 9999 Stn Main<br>Petawawa ON K8H 2X3 | TEL: (613) 687-5511 EXT 5665<br>CSN: 677-5665<br>FAX: (613) 588-6373 |
| Deputy Judge Advocate<br>Canadian Forces Base Trenton<br>P.O. Box 1000 Stn Forces<br>Astra ON K0K 3W0 | TEL: (613) 965-7041<br>CSN: 827-7041<br>FAX: (613) 965-7094 |
| Office of Military Legal Education<br>P.O. Box 17000 Stn Forces<br>Kingston ON K7K 7B4 | TEL: (613) 541-6000 EXT 6988<br>CSN: 271-6988<br>FAX: (613) 541-6907 |

| **Québec** | |
|---|---|
| **Mailing Address** | **Telephone/Fax Numbers** |
| Assistant Judge Advocate General<br>Eastern Region<br>Pierre Le Moyne d'Iberville Building<br>P.O. Box 600, Stn K<br>Montréal QC H1N 3R2 | TEL: (514) 252-2777 EXT 4028<br>CSN: 621-4028<br>FAX: (514) 252-2248 |
| Regional Military Prosecutor<br>Eastern Region<br>P.O. Box 1000 Stn Forces<br>Courcelette QC G0A 4Z0 | TEL: (418) 844-5000<br>EXT 5847/7202<br>CSN: 666-5847/7202<br>FAX: (418) 844-6606 |
| Deputy Judge Advocate<br>Area Support Unit Valcartier<br>P.O. Box 1000 Stn Forces<br>Courcelette QC G0A 4Z0 | TEL: (418) 844-5000 EXT 5297<br>CSN: 666-5297<br>FAX: (418) 844-6606 |
| Deputy Judge Advocate 5 CMBG<br>Area Support Unit Valcartier<br>P.O. Box 1000 Stn Forces<br>Courcelette QC G0A 4Z0 | TEL: (418) 844-5000 EXT 5602<br>CSN: 666-5602<br>FAX: (418) 844-6606 |
| Deputy Judge Advocate<br>3 Wing Bagotville<br>P.O. Box 5000, Stn Bureau-chef<br>Alouette QC G0V 1A0 | TEL: (418) 677-4451<br>CSN: 661-4451<br>FAX: (418) 677-4168 |
| Deputy Judge Advocate<br>Naval Reserve Headquarters<br>112 Dalhousie<br>Quebec QC G1K 4C1 | TEL: (418) 694-5560 EXT 5300<br>CSN: unavailable<br>FAX: (418) 694-5591 |
| Deputy Judge Advocate<br>Area Support Unit St-Jean<br>P.O. Box 100 Stn Bureau-chef<br>Richelain QC J0J 1R0 | TEL: (450) 358-7099 EXT 6129<br>CSN: 661-6129<br>FAX: (450) 358-7009 |

### Belgium

| Mailing Address | Telephone/Fax Numbers |
|---|---|
| c/o Legal Adviser<br>Supreme Headquarters<br>Allied Powers Europe<br>Casteau, Belgium<br>PO Box 5048, Stn Forces<br>Belleville ON K8N 5W6 | TEL: +32-65-444940<br>FAX: +32-65-444997 |

### Germany

| Mailing Address | Telephone/Fax Numbers |
|---|---|
| Assistant Judge Advocate General (Europe)<br>CFSU(E) Selfkant Kaserne<br>CFPO 5053, Stn Forces<br>Belleville ON K8N 5W6 | TEL: 011-49-2451-717165/717170<br>FAX: 011-49-2451-717174 |

### Italy

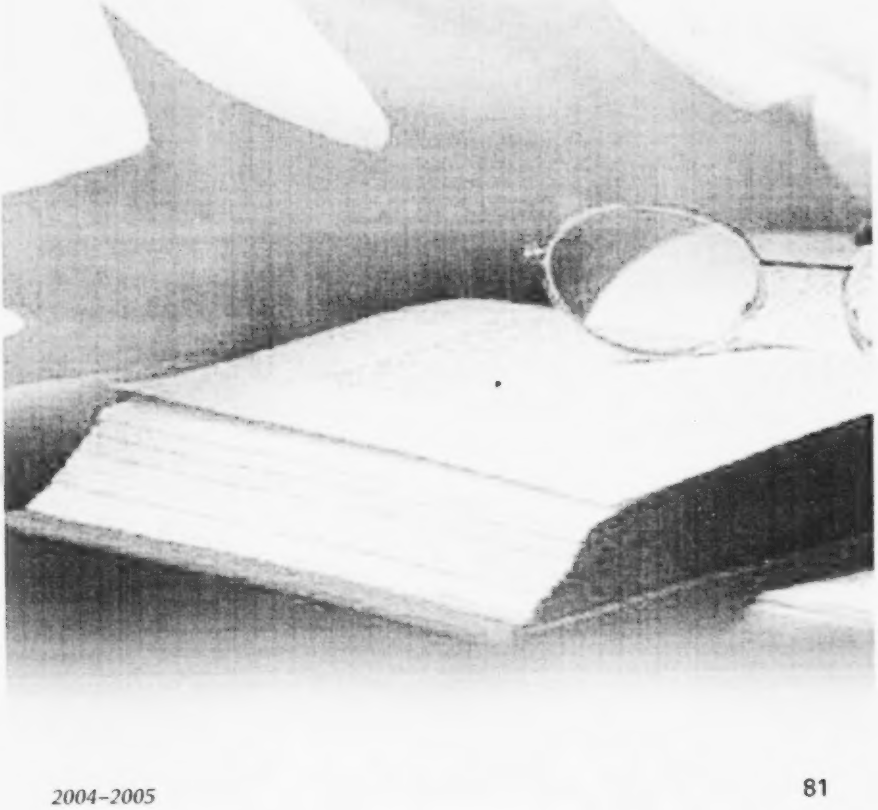
| Mailing Address | Telephone/Fax Numbers |
|---|---|
| Deputy Director Military Law Department<br>International Institute of<br>Humanitarian Law<br>Villa Ormond<br>Corso Cavallotti 113<br>18038 San Remo, Italy | TEL: +39-0184-541848<br>FAX: +39-0184-541600 |

### United States of America

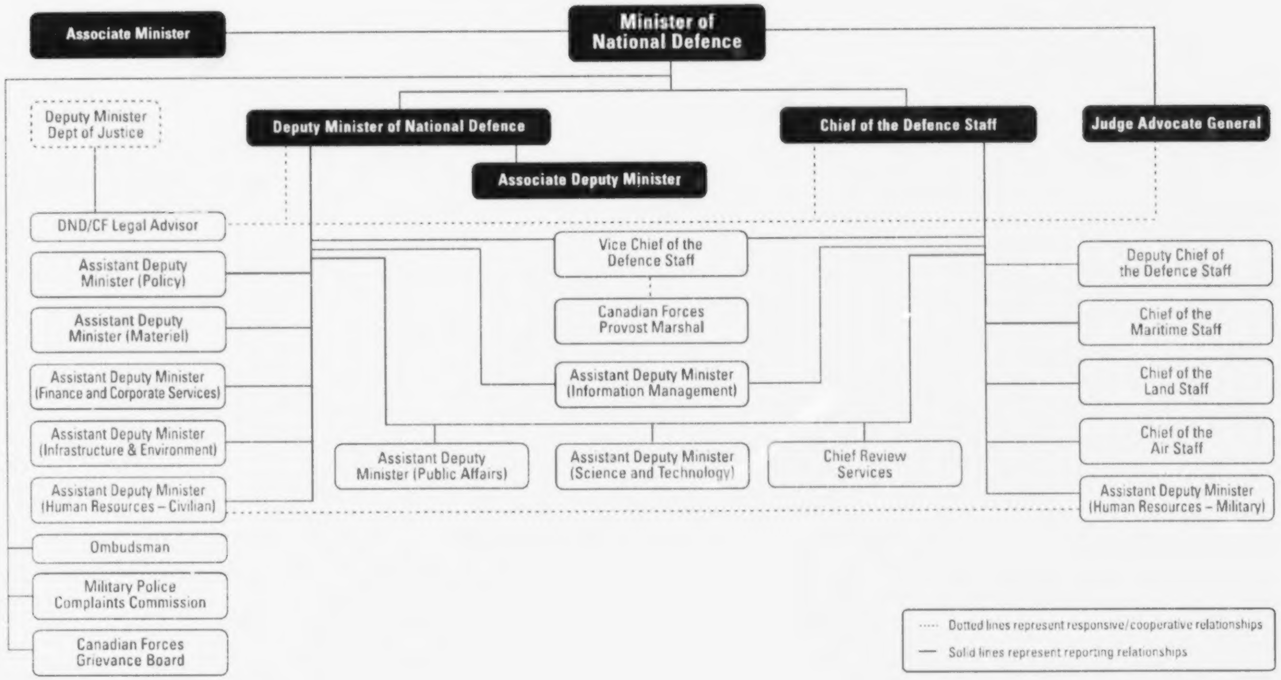
| Mailing Address | Telephone/Fax Numbers |
|---|---|
| Canadian Legal Adviser<br>Headquarters North American<br>Aerospace Defence Command (NORAD)<br>250 Vandenberg, Suite B016<br>Peterson AFB, Colorado Springs<br>Colorado, USA<br>CO 80914-3260 | TEL: 719-554-7635<br>CSN: 312-692-7635<br>FAX: 719-554-2609 |

# ANNEX C

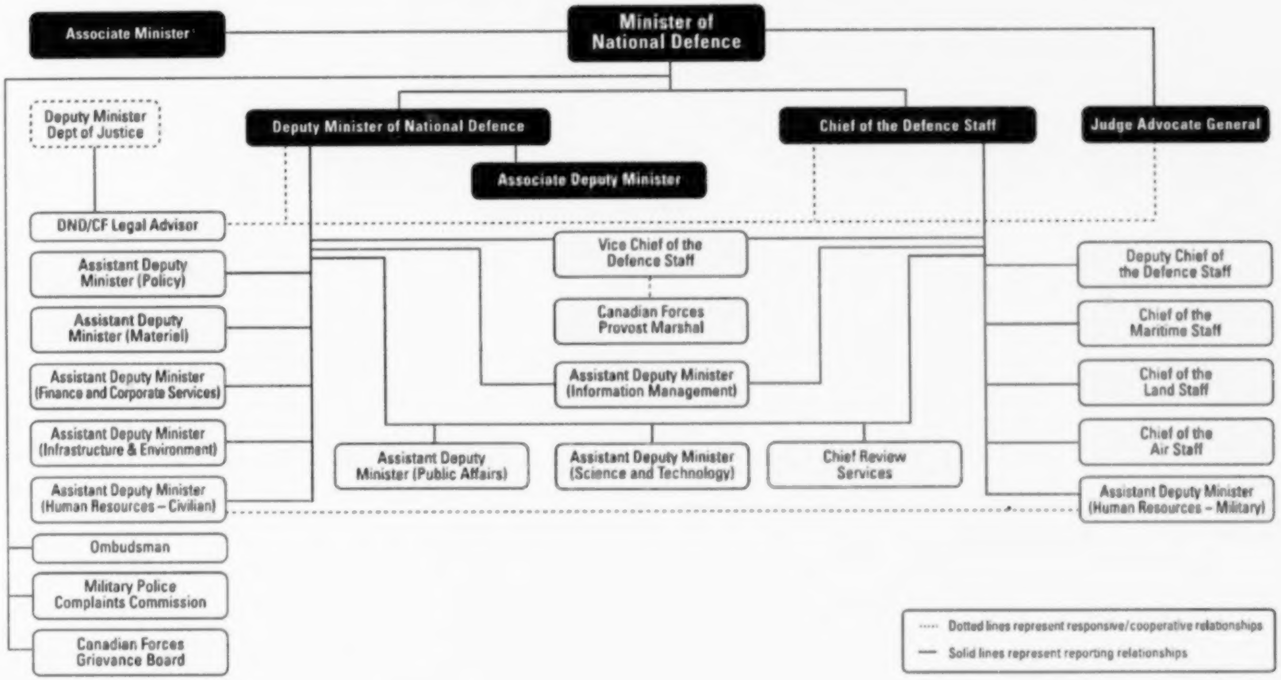
## Organization Chart Displaying the Relationship of the Judge Advocate General to the Minister, the Chief of the Defence Staff and the Deputy Minister



# Primary Responsibilities Diagram


Minister of National Defence
Associate Minister
Deputy Minister of National Defence
Associate Deputy Minister
Chief of the Defence Staff
Judge Advocate General
Deputy Minister Dept of Justice
DND/CF Legal Advisor
Assistant Deputy Minister (Policy)
Assistant Deputy Minister (Materiel)
Assistant Deputy Minister (Finance and Corporate Services)
Assistant Deputy Minister (Infrastructure & Environment)
Assistant Deputy Minister (Human Resources – Civilian)
Ombudsman
Military Police Complaints Commission
Canadian Forces Grievance Board
Vice Chief of the Defence Staff
Canadian Forces Provost Marshal
Assistant Deputy Minister (Information Management)
Assistant Deputy Minister (Public Affairs)
Assistant Deputy Minister (Science and Technology)
Chief Review Services
Deputy Chief of the Defence Staff
Chief of the Maritime Staff
Chief of the Land Staff
Chief of the Air Staff
Assistant Deputy Minister (Human Resources – Military)
Dotted lines represent responsive/cooperative relationships
Solid lines represent reporting relationships

# Primary Responsibilities Diagram


Minister of National Defence
Associate Minister
Deputy Minister of National Defence
Associate Deputy Minister
Chief of the Defence Staff
Judge Advocate General
Deputy Minister Dept of Justice
DND/CF Legal Advisor
Assistant Deputy Minister (Policy)
Assistant Deputy Minister (Materiel)
Assistant Deputy Minister (Finance and Corporate Services)
Assistant Deputy Minister (Infrastructure & Environment)
Assistant Deputy Minister (Human Resources – Civilian)
Ombudsman
Military Police Complaints Commission
Canadian Forces Grievance Board
Vice Chief of the Defence Staff
Canadian Forces Provost Marshal
Assistant Deputy Minister (Information Management)
Assistant Deputy Minister (Public Affairs)
Assistant Deputy Minister (Science and Technology)
Chief Review Services
Deputy Chief of the Defence Staff
Chief of the Maritime Staff
Chief of the Land Staff
Chief of the Air Staff
Assistant Deputy Minister (Human Resources – Military)
Dotted lines represent responsive/cooperative relationships
Solid lines represent reporting relationships

# ANNEX D

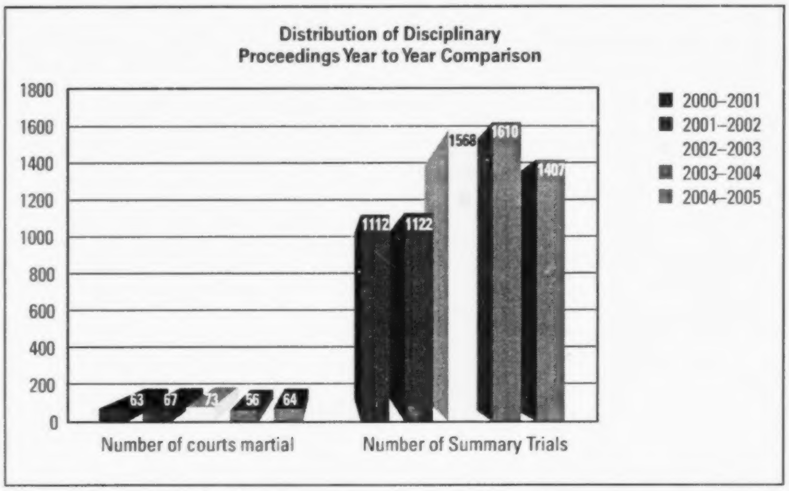
## Summary Trial Year in Review — Statistics: 1 April 2004–31 March 2005

# ANNEX D

## Summary Trials Reporting Period 1 April 2004–31 March 2005

### *Distribution of Service Tribunals*

|  | 2003–2004 |  | 2004–2005 |  |
|---|---|---|---|---|
|  | # | % | # | % |
| Number of courts martial | 56 | 3.4% | 64 | 4% |
| Number of summary trials | 1610 | 96.6% | 1407 | 96% |
| **Total** | **1666** | **100%** | **1471** | **100%** |



*Note: (1) The statistics in this annex are current as of 12 May 2005.*

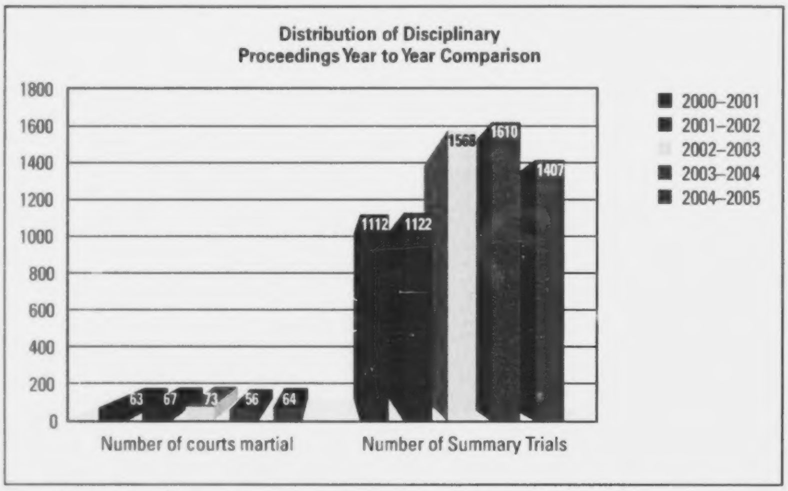
*(2) For statistics relating to prior years, refer to previous JAG Annual Reports.*

# ANNEX D

## Summary Trials Reporting
## Period 1 April 2004–31 March 2005

### *Distribution of Service Tribunals*

| | 2003–2004 | | 2004–2005 | |
|---|---|---|---|---|
| | # | % | # | % |
| Number of courts martial | 56 | 3.4% | 64 | 4% |
| Number of summary trials | 1610 | 96.6% | 1407 | 96% |
| **Total** | **1666** | **100%** | **1471** | **100%** |



*Note: (1) The statistics in this annex are current as of 12 May 2005.*
*(2) For statistics relating to prior years, refer to previous JAG Annual Reports.*

## *Election to Court Martial*

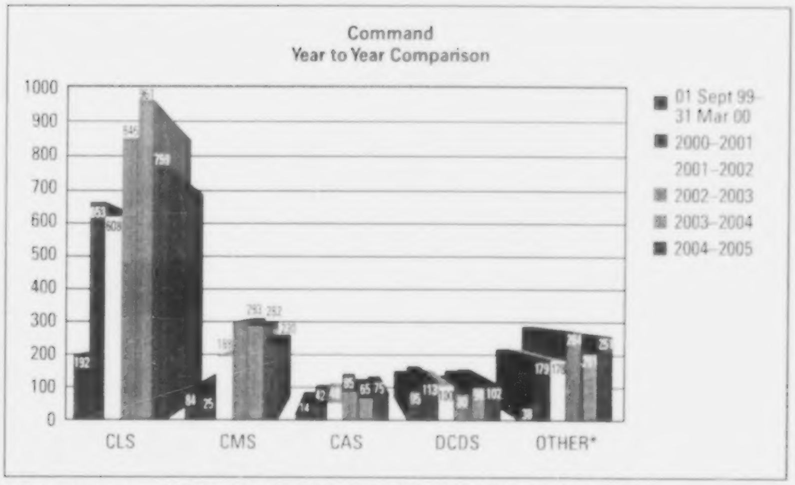
| | 2004–2005 | |
|---|---|---|
| | # | % |
| Number of cases where member offered the right to be tried by court martial | 441 | 100% |
| Number of persons electing court martial when offered | 36 | 8.16% |

## *Language of Summary Trials*

| | 2003–2004 | | 2004–2005 | |
|---|---|---|---|---|
| | # | % | # | % |
| Number in English | 1254 | 77.9% | 1085 | 77% |
| Number in French | 356 | 22.1% | 322 | 23% |
| **Total** | **1610** | **100%** | **1407** | **100%** |

## *Command*

| | 2003–2004 | | 2004–2005 | |
|---|---|---|---|---|
| | # | % | # | % |
| Vice Chief of the Defence Staff (VCDS) | 1 | 0.1% | 0 | 0% |
| Deputy Chief of the Defence Staff (DCDS) | 98 | 6.1% | 92 | 6.54% |
| Chief of the Maritime Staff (CMS) | 282 | 17.5% | 230 | 16.35% |
| Chief of the Land Staff (CLS) | 961 | 59.7% | 759 | 53.94% |
| Chief of the Air Staff (CAS) | 68 | 4.2% | 75 | 5.33% |
| Associate Deputy Minister (ADM (Fin CS)) (Finance and Corporate Services) | 2 | 0.1% | 0 | 0% |
| Associate Deputy Minister (ADM (HR-Mil)) (Human Resources – Military) | 187 | 11.6% | 237 | 16.85% |
| Associate Deputy Minister (ADM (IM)) (Information Management) | 5 | 0.3% | 11 | 0.78% |
| Associate Deputy Minister (Material) (ADM (Mat)) | 6 | 0.4% | 3 | 0.21% |
| **Total** | **1610** | **100%** | **1407** | **100%** |



*Other includes — VCDS, ADM (Fin CS), ADM (HR Mil), ADM (IM) & ADM (Mat)

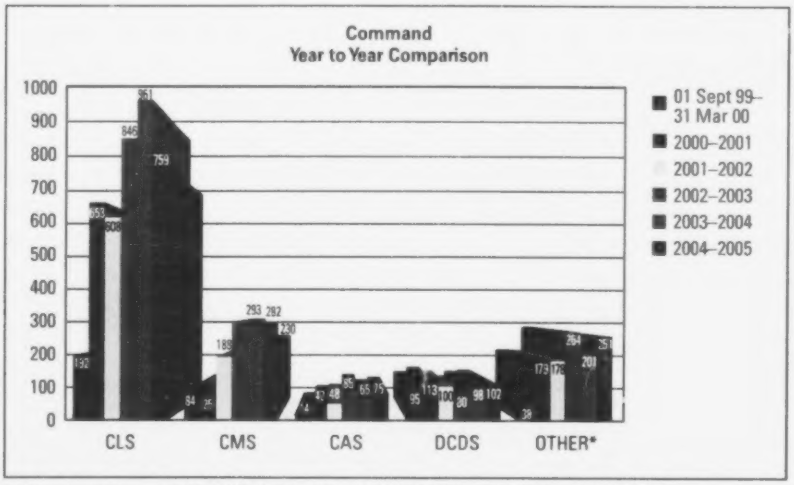
## Rank of Accused

| | 2003–2004 | | 2004–2005 | |
|---|---|---|---|---|
| | # | % | # | % |
| Private and Corporal (includes Master-Corporal*) | 1428 | 88.7% | 1235 | 88% |
| Sergeant to Chief Warrant Officer | 41 | 2.5% | 55 | 4% |
| Officer | 141 | 8.8% | 117 | 8% |
| **Number of cases** | **1610** | **100%** | **1407** | **100%** |

* *Master Corporal is not a rank. It is an appointment pursuant to QR&O article 3.08.*

## Disposition by Case

| | 2003–2004 | | 2004–2005 | |
|---|---|---|---|---|
| | # | % | # | % |
| Guilty | 1545 | 96.0% | 1328 | 94% |
| Not Guilty | 65 | 4.0% | 79 | 6% |
| **Number of cases** | **1610** | **100%** | **1407** | **100%** |



*Other includes – VCDS, ADM (Fin CS), ADM (HR Mil), ADM (IM) & ADM (Mat)

## Rank of Accused

| | 2003–2004 | | 2004–2005 | |
|---|---|---|---|---|
| | # | % | # | % |
| Private and Corporal (includes Master-Corporal*) | 1428 | 88.7% | 1235 | 88% |
| Sergeant to Chief Warrant Officer | 41 | 2.5% | 55 | 4% |
| Officer | 141 | 8.8% | 117 | 8% |
| **Number of cases** | **1610** | **100%** | **1407** | **100%** |

** Master Corporal is not a rank. It is an appointment pursuant to QR&O article 3.08.*

## Disposition by Case

| | 2003–2004 | | 2004–2005 | |
|---|---|---|---|---|
| | # | % | # | % |
| Guilty | 1545 | 96.0% | 1328 | 94% |
| Not Guilty | 65 | 4.0% | 79 | 6% |
| **Number of cases** | **1610** | **100%** | **1407** | **100%** |

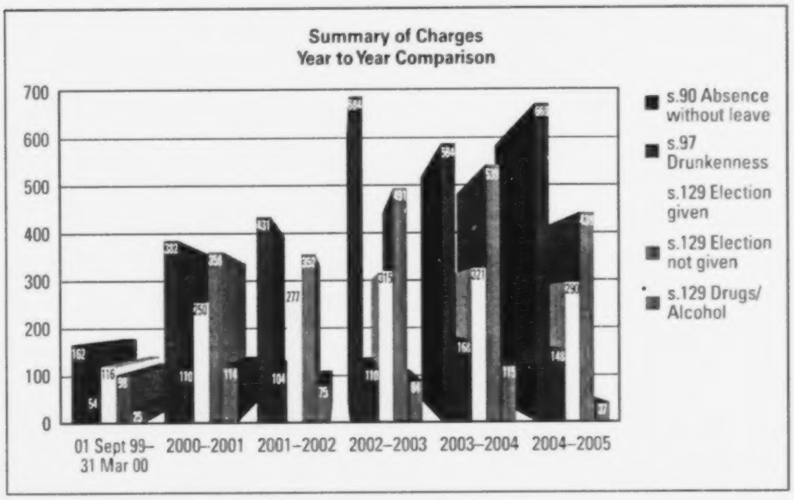
## *Findings by Charge*

| | 2003–2004 | | 2004–2005 | |
|---|---|---|---|---|
| | # | % | # | % |
| Guilty | 1877 | 89.5% | 1653 | 87.18% |
| Guilty – special finding | 8 | 0.4% | 7 | 0.37% |
| Guilty of included offence | 2 | 0.1% | 2 | 0.11% |
| Not guilty | 151 | 7.1% | 182 | 9.60% |
| Charge stayed | 54 | 2.6% | 48 | 2.53% |
| Charge not proceeded with | 6 | 0.3% | 4 | 0.21% |
| **Total** | **2098** | **100%** | **1896** | **100%** |

## *Summary of Charges*

| NDA Section | Description | 2003–2004 | | 2004–2005 | |
|---|---|---|---|---|---|
| | | # | % | # | % |
| 83 | Disobedience of lawful command | 58 | 2.8% | 52 | 2.74% |
| 84 | Striking or offering violence to a superior | 5 | 0.2% | 4 | 0.21% |
| 85 | Insubordinate behaviour | 71 | 3.4% | 71 | 3.74% |
| 86 | Quarrels and disturbances | 27 | 1.3% | 38 | 2.00% |
| 87 | Resisting or escaping from arrest or custody | 0 | 0.0% | 1 | 0.05% |
| 90 | Absence without leave | 684 | 32.6% | 668 | 35.23% |
| 93 | Cruel or disgraceful conduct | 3 | 0.1% | 1 | 0.05% |
| 95 | Abuse of subordinates | 2 | 0.1% | 11 | 0.58% |
| 97 | Drunkenness | 168 | 8.0% | 148 | 7.81% |
| 98 | Malingering or maiming | 0 | 0.0% | 1 | 0.05% |
| 101.1 | Failure to comply with conditions | 0 | 0.0% | 4 | 0.21% |
| 111 | Improper driving of vehicles | 6 | 0.3% | 6 | 0.33% |
| 112 | Improper use of vehicles | 8 | 0.4% | 10 | 0.53% |
| 114 | Stealing | 17 | 0.8% | 18 | 0.95% |
| 115 | Receiving | 0 | 0.0% | 3 | 0.16% |
| 116 | Destruction, damage, loss or improper disposal | 17 | 0.8% | 18 | 0.95% |
| 117 | Miscellaneous offences | 11 | 0.5% | 18 | 0.95% |
| 118 | Failure to appear or attend | 0 | 0 | 1 | 0.05% |
| 127 | Negligent handling of dangerous substances | 2 | 0.1% | 0 | 0% |
| 128 | Conspiracy | 0 | 0 | 1 | 0.05% |
| 129 | Conduct to the prejudice of good order & discipline – Offences of sexual nature | 3 | 0.1% | 2 | 0.11% |

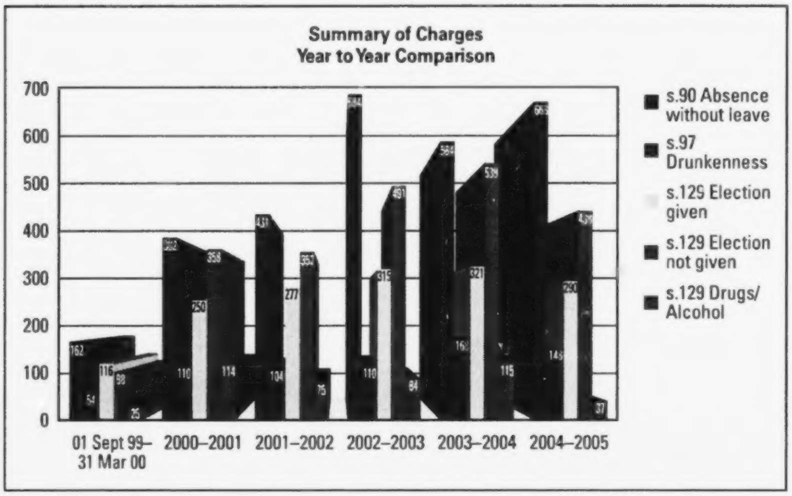
| NDA Section | Description | 2003–2004 |  | 2004–2005 |  |
|---|---|---|---|---|---|
|  |  | # | % | # | % |
| 129 | Conduct to the prejudice of good order & discipline — Drugs/Alcohol | 115 | 5.5% | 37 | 1.95% |
| 129 | Conduct to the prejudice of good order & discipline — election to be tried by CM Given (excl. cases reported in 129-Offences of sexual nature & 129-Drugs/Alcohol) | 321 | 15.3% | 290 | 15.30% |
| 129 | Conduct to the prejudice of good order & discipline — election to be tried by CM not Given (excl. cases reported in 129-Offences of sexual nature & 129-Drugs/Alcohol) | 539 | 25.7% | 433 | 22.84% |
| 130 | Service trial of civil offences | 41 | 2.0% | 60 | 3.16% |
| **Number of charges** |  | **2098** | **100%** | **1896** | **100%** |



## *Authority*

|  | 2003–2004 |  | 2004–2005 |  |
|---|---|---|---|---|
|  | # | % | # | % |
| Delegated Officer | 1157 | 71.9% | 997 | 71% |
| Commanding Officer | 390 | 24.2% | 339 | 24% |
| Superior Commander | 63 | 3.9% | 71 | 5% |
| **Total** | **1610** | **100%** | **1407** | **100%** |

| NDA Section | Description | 2003–2004 |  | 2004–2005 |  |
|---|---|---|---|---|---|
|  |  | # | % | # | % |
| 129 | Conduct to the prejudice of good order & discipline – Drugs/Alcohol | 115 | 5.5% | 37 | 1.95% |
| 129 | Conduct to the prejudice of good order & discipline – election to be tried by CM Given (excl. cases reported in 129-Offences of sexual nature & 129-Drugs/Alcohol) | 321 | 15.3% | 290 | 15.30% |
| 129 | Conduct to the prejudice of good order & discipline – election to be tried by CM not Given (excl. cases reported in 129-Offences of sexual nature & 129-Drugs/Alcohol) | 539 | 25.7% | 433 | 22.84% |
| 130 | Service trial of civil offences | 41 | 2.0% | 60 | 3.16% |
| **Number of charges** |  | **2098** | **100%** | **1896** | **100%** |



## *Authority*

|  | 2003–2004 |  | 2004–2005 |  |
|---|---|---|---|---|
|  | # | % | # | % |
| Delegated Officer | 1157 | 71.9% | 997 | 71% |
| Commanding Officer | 390 | 24.2% | 339 | 24% |
| Superior Commander | 63 | 3.9% | 71 | 5% |
| **Total** | **1610** | **100%** | **1407** | **100%** |

## Punishments

| | 2003–2004 | | 2004–2005 | |
|---|---|---|---|---|
| | # | % | # | % |
| Detention (suspended) | 12 | 0.6% | 13 | 0.75% |
| Detention | 18 | 0.9% | 26 | 1.51% |
| Reduction in rank | 8 | 0.4% | 4 | 0.23% |
| Severe reprimand | 1 | 0.1% | 4 | 0.23% |
| Reprimand | 52 | 2.6% | 53 | 3.07% |
| Fine | 1173 | 58.9% | 998 | 57.79% |
| Confinement to ship or barracks | 475 | 23.9% | 411 | 23.80% |
| Extra work and drill | 111 | 5.6% | 110 | 6.37% |
| Stoppage of leave | 61 | 3.0% | 41 | 2.37% |
| Caution | 81 | 4.0% | 67 | 3.88% |
| **Total** | **1992** | **100%** | **1727** | **100%** |

*Note: More than one type of punishment may be awarded in a sentence.*

## Requests for Review

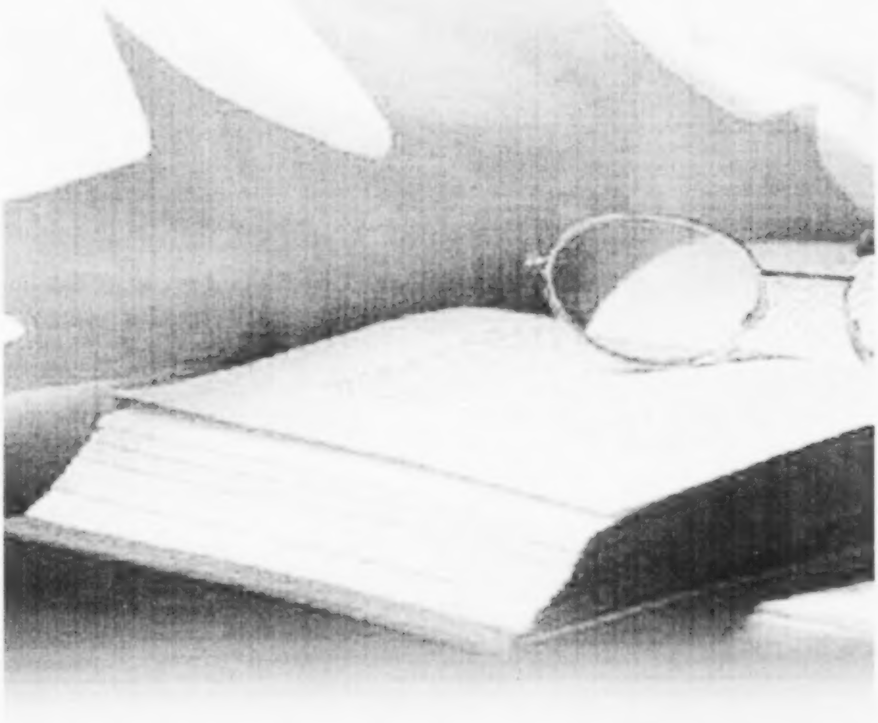
| | 2003–2004 | | 2004–2005 | |
|---|---|---|---|---|
| | # | % | # | % |
| Requests for review based on finding | 1 | 3.8% | 6 | 17% |
| Requests for review based on sentence | 10 | 38.5% | 13 | 36% |
| Requests for review based on finding & sentence | 15 | 57.7% | 17 | 47% |
| **Total** | **26** | **100%** | **36** | **100%** |

## Decision of Review Authority

| | 2003–2004 | | 2004–2005 | |
|---|---|---|---|---|
| | # | % | # | % |
| Upholds decision | 9 | 34.6% | 10 | 28% |
| Quashes/substitutes findings | 4 | 15.4% | 14 | 39% |
| Substitutes punishment | 6 | 23.1% | 5 | 14% |
| Mitigates/commutes/remits punishment | 7 | 26.9% | 7 | 19% |
| **Total** | **26** | **100%** | **36** | **100%** |

# ANNEX E

## Court Martial Year in Review — Statistics: 1 April 2004 to 31 March 2005



# ANNEX E

## Court Martial Reporting
## Period 1 April 2004 – 31 March 2005

### *Number of Courts Martial*

| | 2003–2004 | 2004–2005 |
|---|---|---|
| | 56 | 64 |

### *Courts Martial By Type*

| | 2003–2004 # | 2003–2004 % | 2004–2005 # | 2004–2005 % |
|---|---|---|---|---|
| Standing Court Martial | 56 | 100% | 64 | 100% |
| Disciplinary Court Martial | 0 | 0% | 0 | 0% |
| General Court Martial | 0 | 0% | 0 | 0% |
| Special General Court Martial | 0 | 0% | 0 | 0% |
| **Total** | **56** | **100%** | **64** | **100%** |

### *Summary of Charges*

| NDA Section | Description | 2003–2004 # | 2004–2005 # |
|---|---|---|---|
| 74 | Offences by any person in presence of enemy | 1 | 0 |
| 75 | Offences related to security | 1 | 0 |
| 83 | Disobeying a lawful command | 8 | 10 |
| 84 | Striking or offering violence to a superior officer | 1 | 4 |
| 85 | Insubordinate behaviour | 6 | 9 |

*Note: For statistics relating to prior years, refer to previous JAG Annual Reports.*

| NDA Section | Description | 2003–2004 # | 2004–2005 # |
|---|---|---|---|
| 86 | Quarrels and disturbances | 0 | 3 |
| 86(a) | Fought with a person subject to CSD | 0 | 1 |
| 90 | Absent without leave | 5 | 10 |
| 93 | Cruel or disgraceful conduct | 2 | 1 |
| 95 | Abuse of subordinates | 2 | 2 |
| 97 | Drunkenness | 4 | 6 |
| 98(a) | Malingering | 0 | 2 |
| 101.1 | Failure to comply with conditions | 2 | 0 |
| 102(a) | Resisting a NCM performing an arrest | 0 | 1 |
| 113 | Causing fires | 1 | 0 |
| 114 | Stealing | 1 | 7 |
| 114 | Stealing when entrusted | 4 | 4 |
| 115 | Receiving | 1 | 1 |
| 116 | Destruction, damage, loss or improper disposal | 1 | 1 |
| 117(f) | An act of a fraudulent nature | 12 | 4 |
| 118.1 | Failing to appear before a court martial | 1 | 0 |
| 122 | False answers or false information | 1 | 2 |
| 124 | Negligent performance of a military duty | 2 | 0 |
| 125(a) | Wilfully (or negligently) made a false entry | 7 | 4 |
| 125(b) | When signing a document, left material part blank | 2 | 0 |
| 125(c) | Suppressed or altered a military document with intent to deceive | 2 | 2 |
| 129 | An act to the prejudice of good order and discipline | 5 | 13 |
| 129 | Conduct to the prejudice of good order and discipline | 28 | 18 |
| 129 | Neglect to the prejudice of good order and discipline | 3 | 3 |
| 130 (4(1) CDSA) | Possession of substances | 0 | 1 |
| 130 (5(1) CDSA) | Trafficking of substances | 5 | 12 |

| NDA Section | Description | 2003–2004 # | 2004–2005 # |
|---|---|---|---|
| 130<br>(21 CCC) | Party to an offence | 1 | 0 |
| 130<br>(82(1) CCC) | Possession without lawful excuse of an explosive | 0 | 1 |
| 130<br>(86(1) CCC) | Careless use of a firearm | 1 | 2 |
| 130<br>(87 CCC) | Pointing a firearm | 2 | 2 |
| 130<br>(88 CCC) | Possession of a weapon for a dangerous purpose | 0 | 1 |
| 130<br>(91(2) CCC) | Unauthorized possession of a prohibited weapon | 1 | 1 |
| 130<br>(122 CCC) | Breach of trust by public officer | 0 | 2 |
| 130<br>(129 CCC) | Resisting a peace officer | 0 | 1 |
| 130<br>(139(2) CCC) | Obstruction of justice | 0 | 1 |
| 130<br>(163.1(4) CCC) | Possession of child pornography | 1 | 0 |
| 130<br>(173(1) CCC) | Committed an indecent act | 1 | 0 |
| 130<br>(253(b) CCC) | Operating while impaired | 0 | 1 |
| 130<br>(264(1) CCC) | Criminal harassment | 1 | 0 |
| 130<br>(264.1(1) CCC) | Uttering threats | 1 | 1 |
| 130<br>(266 CCC) | Assault | 7 | 10 |
| 130<br>(267(a) CCC) | Assault with a weapon | 3 | 1 |
| 130<br>(267(b) CCC) | Assault causing bodily harm | 2 | 2 |
| 130<br>(268 CCC) | Aggravated assault | 0 | 1 |
| 130<br>(269.1 CCC) | Torture | 0 | 1 |
| 130<br>(271 CCC) | Sexual assault | 12 | 11 |
| 130<br>(272(1)(c) CCC) | Sexual assault causing bodily harm | 0 | 1 |
| 130<br>(279 CCC) | Kidnapping, forcible confinement, hostage taking | 3 | 0 |

| NDA Section | Description | 2003–2004 # | 2004–2005 # |
|---|---|---|---|
| 130<br>(342 CCC) | Theft, forgery of a credit card | 4 | 0 |
| 130<br>(348 CCC) | Breaking and entering with intent, committing offence or breaking out | 1 | 0 |
| 130<br>(362(1)(a) CCC) | False pretences | 0 | 1 |
| 130<br>(366(1) CCC) | Forgery | 0 | 5 |
| 130<br>(368 CCC) | Uttering a forged document | 5 | 1 |
| 130<br>(434.1 CCC) | Arson – own property | 2 | 0 |
| **Total Offences** | | **156** | **168** |

## *Disposition By Case*

| | 2003–2004 | | 2004–2005 | |
|---|---|---|---|---|
| | # | % | # | % |
| Found/plead guilty | 48 | 86% | 54 | 84% |
| Not guilty | 8 | 14% | 8 | 12% |
| Stay of proceedings | 0 | 0% | 1 | 2% |
| Withdrawal | 0 | 0% | 0 | 0% |
| Other (*NDA* section 202.12) | 0 | 0% | 1 | 2% |
| **Total** | **56** | **100%** | **64** | **100%** |

## *Sentences*

| Punishment Type | 2003–2004 | 2004–2005 |
|---|---|---|
| Dismissal | 0 | 1 |
| Imprisonment | 9 | 8 |
| Detention | 6 | 4 |
| Reduction in rank | 4 | 4 |
| Severe reprimand | 10 | 3 |
| Reprimand | 11 | 17 |
| Fine | 36 | 40 |
| Confined to barracks | 1 | 3 |
| Extra work and drill | 0 | 0 |
| Caution | 0 | 0 |
| **Total** | **77** | **86** |

*Note: More than one type of punishment can be included in a sentence.*

## Language of Trial

| | 2003–2004<br>#| | 2004–2005<br># | |
|---|---|---|---|---|
| | # | % | # | % |
| Trial in English | 47 | 84% | 50 | 78% |
| Trial in French | 9 | 16% | 14 | 22% |
| **Total** | **56** | **100%** | **64** | **100%** |

## Courts Martial By Command

| | 2003–2004 | | 2004–2005 | |
|---|---|---|---|---|
| | # | % | # | % |
| National Defence Headquarters (NDHQ) | 6 | 11% | 12 | 19% |
| Deputy Chief of the Defence Staff | 1 | 2% | 6 | 9% |
| Chief of the Maritime Staff | 12 | 20% | 6 | 9% |
| Chief of the Land Staff | 30 | 54% | 33 | 52% |
| Chief of the Air Staff | 5 | 9% | 7 | 11% |
| Canadian Defence Academy* | 2 | 4% | 0 | 0% |
| **Total** | **56** | **100%** | **64** | **100%** |

** CF Support and Training Group has been re-organized and is now the Canadian Defence Academy.*

## Courts Martial By Rank

| | 2003–2004 | 2004–2005 |
|---|---|---|
| Private and Corporal (includes Master Corporal*) | 39 | 51 |
| Sergeant to Chief Warrant Officer | 11 | 7 |
| Officer | 6 | 9 |
| Other | 0 | 0 |
| **Total** | **56** | **67**** |

** Master Corporal is not a rank. It is an appointment pursuant to QR&O article 3.08.*

*** Two joint trials involving 5 accused members.*

# ANNEX F

## Court Martial Appeal Court Year in Review — Statistics: 1 April 2004 to 31 March 2005

# ANNEX F

## Court Martial Appeal Court Reporting Period 1 April 2004 to 31 March 2005

### *Appeals*

| Court | 2003–2004 | 2004–2005 |
|---|---|---|
| CMAC | 4 | 5 |
| Supreme Court of Canada | 0 | 0 |
| **Total** | **4** | **5** |

### *Appeals by Party*

| Status of Appellant | 2003–2004 | 2004–2005 |
|---|---|---|
| Appeals by Crown | 0 | 1 |
| Appeals by Offender | 4 | 4 |
| **Total** | **4** | **5** |

### *Nature of Appeal*

| Grounds | 2003–2004 | 2004–2005 |
|---|---|---|
| Finding | 1 | 1 |
| Sentence (Severity and/or legality) | 1 | 1 |
| Finding and sentence | 2 | 3 |
| **Total** | **4** | **5** |

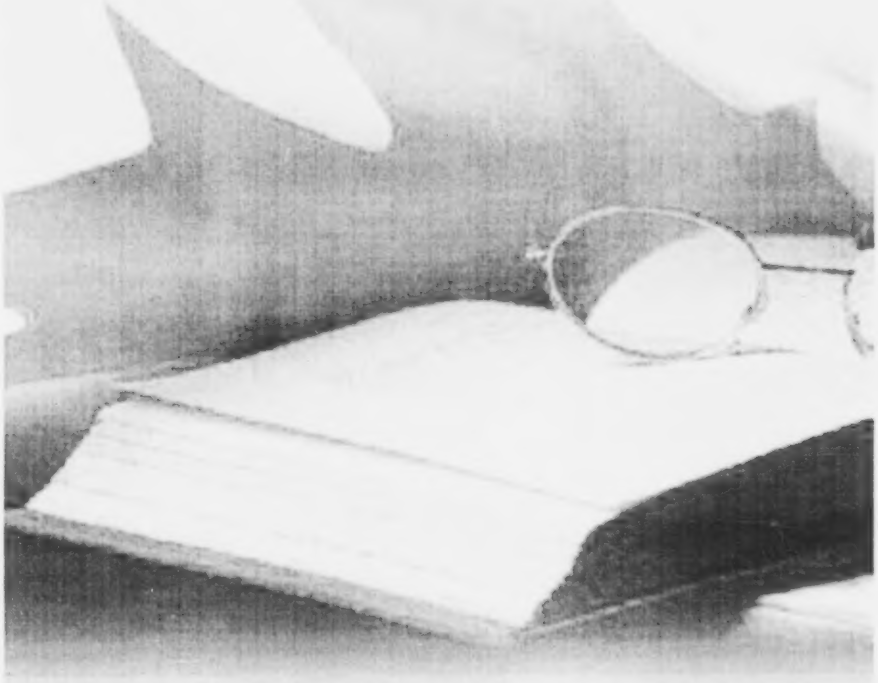
### *Disposition*

| | 2003–2004 | 2004–2005 |
|---|---|---|
| Upheld trial decision | 2 | 2 |
| Overturned trial decision in whole or part | 2 | 3 |
| **Total** | **4** | **5** |

*Note: For statistics relating to prior years, refer to previous JAG Annual Reports.*

# ANNEX G

## Presiding Officer Certification Training (POCT) & Presiding Officer Re-Certification Test (PORT): 1 April 2004 to 31 March 2005



# ANNEX G

## Presiding Officer Certification Training (POCT) & Presiding Officer Re-Certification Test (PORT): Period 1 April 2004 to 31 March 2005

### *Officers Certified Through POCT*

| | 2003–2004 | 2004–2005 |
|---|---|---|
| | 619 | 566 |

### *Officers Re-Certified Through PORT*

| | 2003–2004 | 2004–2005 |
|---|---|---|
| | 95 | 553 |

### *POCT: Officer/NCM*

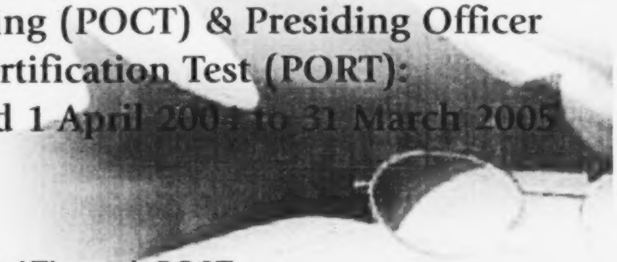
| | 2003–2004 | | 2004–2005 | |
|---|---|---|---|---|
| | # | % | # | % |
| Officers | 619 | 78% | 566 | 73% |
| Non-Commissioned Members (NCM) | 170 | 22% | 207 | 27% |
| Total | 789 | 100% | 773 | 100% |

### *POCT — Year to Year Comparison*

| | 1999/2000 | 2000/2001 | 2001/2002 | 2002/2003 | 2003/2004 | 2004/2005 |
|---|---|---|---|---|---|---|
| Officers | 2097 | 878 | 586 | 626 | 619 | 566 |
| NCMs | 309 | 72 | 94 | 178 | 170 | 207 |
| Total | 2406 | 950 | 680 | 804 | 789 | 773 |

# ANNEX G

## Presiding Officer Certification Training (POCT) & Presiding Officer Re-Certification Test (PORT): Period 1 April 2004 to 31 March 2005



### *Officers Certified Through POCT*

| | 2003–2004 | 2004–2005 |
|---|---|---|
| | 619 | 566 |

### *Officers Re-Certified Through PORT*

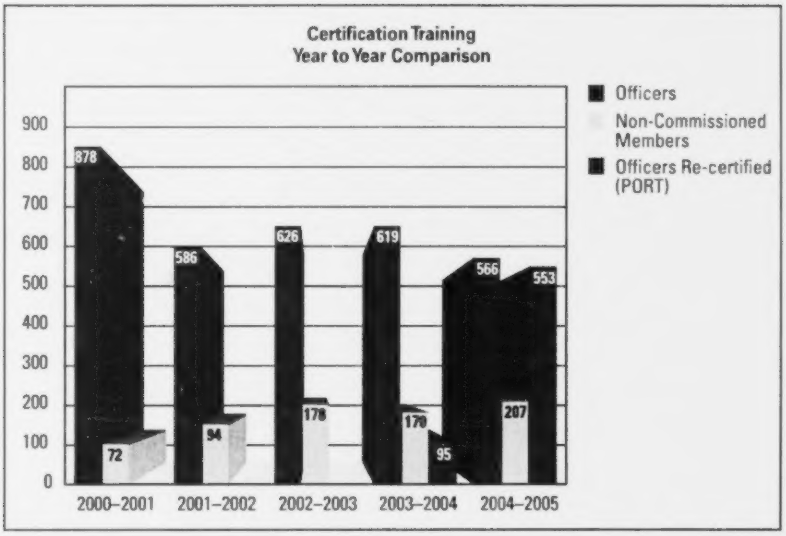
| | 2003–2004 | 2004–2005 |
|---|---|---|
| | 95 | 553 |

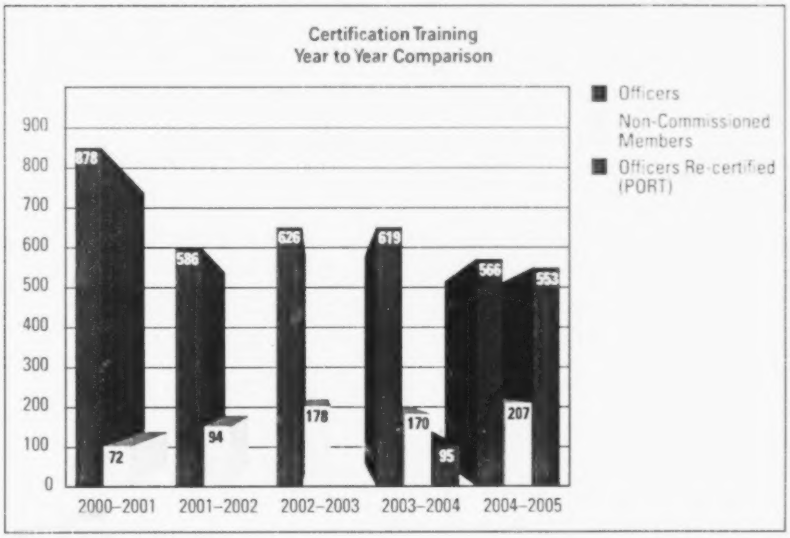
### *POCT: Officer/NCM*

| | 2003–2004 | | 2004–2005 | |
|---|---|---|---|---|
| | # | % | # | % |
| Officers | 619 | 78% | 566 | 73% |
| Non-Commissioned Members (NCM) | 170 | 22% | 207 | 27% |
| **Total** | **789** | **100%** | **773** | **100%** |

### *POCT — Year to Year Comparison*

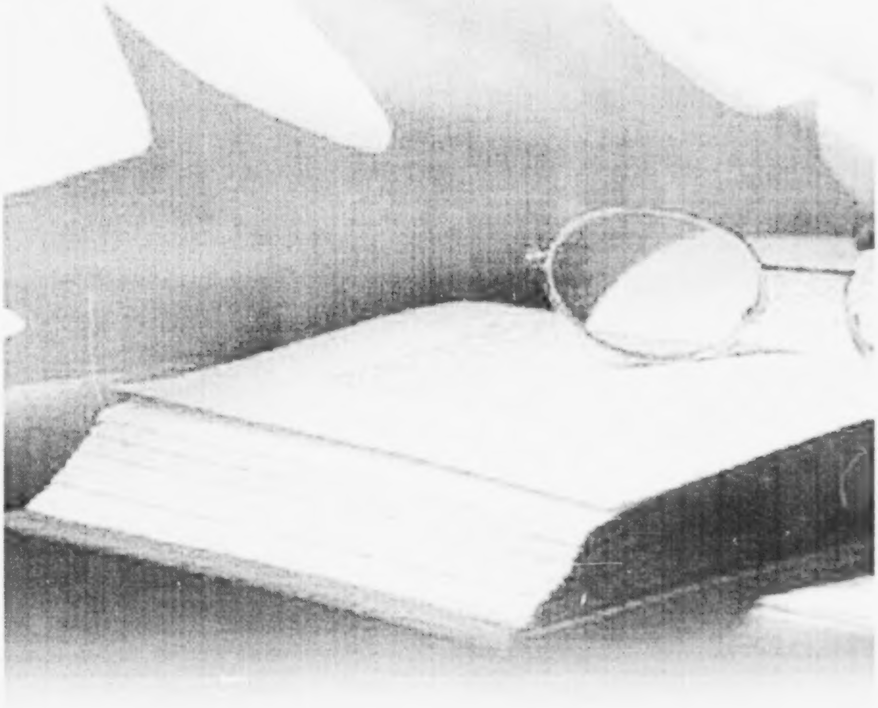
| | 1999/2000 | 2000/2001 | 2001/2002 | 2002/2003 | 2003/2004 | 2004/2005 |
|---|---|---|---|---|---|---|
| Officers | 2097 | 878 | 586 | 626 | 619 | 566 |
| NCMs | 309 | 72 | 94 | 178 | 170 | 207 |
| **Total** | **2406** | **950** | **680** | **804** | **789** | **773** |


Certification Training
Year to Year Comparison
Officers
Non-Commissioned Members
Officers Re-certified (PORT)
900
800
700
600
500
400
300
200
100
0
878
72
586
94
626
178
619
170
95
566
207
553
2000–2001
2001–2002
2002–2003
2003–2004
2004–2005


Certification Training
Year to Year Comparison
Officers
Non-Commissioned Members
Officers Re-certified (PORT)
900
800
700
600
500
400
300
200
100
0
878
72
586
94
626
178
619
170
95
566
207
553
2000–2001
2001–2002
2002–2003
2003–2004
2004–2005

# ANNEX H

# Judge Advocate General Directives



# ANNEX H

## Judge Advocate General Directives

The following directives on military justice have been published during this report period.

| **Directive:** 033/04 | **Original Date:** December 2004 | **Updates:** |
|---|---|---|
| **Subject:** Protection of electronic information subject to the solicitor-client privilege. | | |
| **Cross reference:** NDSI 27; DAOD 6005-0, 6005-1; JAG IS Security Orders; JAG Security Orders; JAG Directive 006/00; CBA *Code of Professional Conduct* (A-LG-019-000/JD-001); Michel J. Desjardins, *Solicitor-Client Privilege in the Public Sector* (28 Oct 99); 2102-132-7 *Designated Domain Workstation Security* SOPs v2.5 (DDCEI 3-5) dated 7 Aug 02. | | |

### *Application*

1. This policy directive applies to members and civilian employees of the Office of the Judge Advocate General having access to electronic information subject to the solicitor-client privilege.
2. This directive outlines the Office of the JAG policy on the protection of electronic information subject to solicitor-client privilege, including the provision of legal advice by email.

### *Solicitor-Client Privilege*

3. For the purposes of this directive, the solicitor-client privilege includes the following two categories:

   a. **Legal advice privilege.** This privilege protects communications between the client (or agents) and the client legal advisers, communications between the client legal advisers and third parties (if made for the purpose of pending/anticipated litigation) and communications between the client and third parties (if made for the purpose of obtaining information to be submitted to the client's legal advisers for the purpose of obtaining legal advice)[1]; and

   b. **Litigation privilege.** This privilege protects documents where the dominant purpose of their creation was to prepare for realistically anticipated litigation[2].

4. Chapter IV of the CBA *Code of Professional Conduct* states in part:

   "The lawyer has a duty to hold in strict confidence all information concerning the business and affairs of the client acquired in the course of the professional relationship, and should not divulge such information unless disclosure is expressly or impliedly authorized by the client, required by law or otherwise permitted or required by this Code."

5. All legal officers are professionally responsible for the protection of the privilege and accountable to the JAG for its breach.

6. Recognizing that legal officers are individually responsible and accountable for the handling of such information, this directive outlines how this responsibility can be met in the working environment of the Office of the JAG.

### *Departmental Classification*

7. Classified and protected information will be secured and processed in accordance with the National Defence security framework. The need to protect information in the Office of the JAG can stem from any, a combination of or all of the following three sources (refer to National Defence Security Instruction 27 for details):

---

[1] Michel J. Desjardins, Solicitor-Client Privilege in the Public Sector (28 Oct 99), p. 15.

[2] Desjardins, ibid., p. 38.

a. Information in the national interest (UNCLAS, CONFIDENTIAL, SECRET or above) is classified according to DND security norms by the originator of the information. Classification can be reviewed, updated or downgraded (even to UNCLAS) by the originator in accordance with DND directives;

b. Personal information (PROTECTED A, B and C) is protected IAW NDSI 27 by the originator of the information. Classification can be reviewed, updated or downgraded (even to UNPROTECTED) by the originator in accordance with DND directives;

c. Sensitive information (PROTECTED A, B and C) is protected IAW NDSI 27 para. 27.23 (business information) and 27.24 (advice). Information subject to the solicitor-client privilege is sensitive information IAW NDSI 27 para. 27.24 and the *Access to Information Act*, RSC c. A-1, s. 23. It is protected according to this directive. By contrast to other classified and protected information, the originator cannot remove the privilege — only the client of the legal advice can.

8. Information under the control of the CF, including legal advice, must be assessed from three perspectives and then classified and/or protected accordingly: does the information relate to the national interest? Is it personal information? Is it sensitive information?

### *Level of Protection*

9. It is the policy in the Office of the JAG that solicitor-client information, as a minimum, will be marked, processed and safeguarded as Protected B information. In some cases, according to the injury test, the information might require a higher level of classification and/or protection.

### *Electronic Document Markings*

10. Headers in the first line, and footers in the last line of emails and other electronic documents will clearly identify, if applicable, that the document is subject to the solicitor-client privilege by using the marking "SOLICITOR-CLIENT PRIVILEGE".

11. Legal advice provided by legal officers will be marked:

    "SOLICITOR-CLIENT PRIVILEGE" (followed by the appropriate security classification on the next line).

### *Legal Advice by Email*

12. The first line of all emails containing solicitor-client information will be the following: "SOLICITOR-CLIENT PRIVILEGE".

13. The following sequence of events would apply in the preparation of legal advice submitted by email:

    a. The legal advice is drafted in a separate document or in the body of the email;

    b. The marking "SOLICITOR-CLIENT PRIVILEGE" should constitute the first line of the email;

    c. The marking of the appropriate security classification would constitute the second line of the email;

    d. The next line should be the *file number* prefixed by the *JAG file location*. All legal advice given shall be identified with the proper file number. Such file number should be derived from an authorized file plan. The file location is the directorate or regional office;

    e. Above the signature block, the following line should be used: "//signed & encrypted electronically//";

    f. A signature block in accordance with JAG Directive 005/99;

    g. Below the signature block, the following caveat should be used (the caveat can be inserted in an alternate signature block):

       *"This information constitutes legal advice and is subject to solicitor-client privilege. If you receive this email by error, please advise the sender and return all copies of the email to him/her. The rules applicable to the protection of PROTECTED B information apply to solicitor-client information."*

    h. The email is electronically signed encrypted and sent.

### *Storage of Information on Electronic Media*

14. All information subject to the solicitor-client privilege shall be stored on electronic media in accordance with this directive.

15. In networked environments, legal officers and support staff will store information subject to the solicitor-client privilege in accordance with Annex A to this directive.

16. In stand alone environments, including laptops and remote users, legal officers and support staff will store information subject to the solicitor-client privilege in accordance with Annex B to this directive.

17. In cases where it is necessary to share information subject to the solicitor-client privilege, sharing of the information will adhere to the procedure set out in Annex C to this directive.

18. As an alternative to para 15 to 17, legal officers and support staff can store information subject to the solicitor-client privilege on removable media and secure such media IAW Departmental security policy.

### *Training*

19. Legal officers are required to complete the Entrust Desktop computer-based training and to familiarize themselves with the Entrust/ICE help file. Supervisors must personally verify if their subordinates have completed, understand and know how to manage information subject to the solicitor-client privilege as outlined in this directive.

### *Screening*

20. All personnel, when they start employment in the Office of the JAG and whenever a significant change to this directive is made, must receive the *Personnel Information Systems (IS) Security Briefing* from the ISSO, which includes a copy of this directive. The briefing form must then be signed.

21. All personnel having access to information subject to the solicitor-client privilege, including physical access to servers, whether they work for the Office of the JAG or not, should receive the *Personnel Information Systems (IS) Security Briefing* from the JAG ISSO, including a copy of this directive.

*(original signed by)*
**Jerry S.T. Pitzul, Q.C.**
MGen
JAG
992-3019/996-8470

**Attachments (not included)**

Annex A — Instructions on how to store solicitor-client information (Network Environment).

Annex B — Instructions on how to store solicitor-client information (Standalone Environment).

Annex C — Instructions on how to share solicitor-client information (Network Environment).

**Distribution List**

All military and civilian employees of the Office of the JAG.

| | | |
|---|---|---|
| **Directive:** 032/04 | **Original Date:** October 2004 | **Updates:** |
| **Subject:** Terms of Accountability — AJAG CPO1/CWO | | |
| **Cross reference:** | | |

## *Introduction*

1. This directive defines the role, duties and accountabilities of Chief Petty Officers First Class (CPO1) and Chief Warrant Officers (CWO) in all of the regional Assistant Judge Advocate General (AJAG) and Deputy Judge Advocate (DJA) Offices. It also describes available resources and Performance Evaluation Reports. This directive is another milestone in the application of military justice reforms and will ensure that the Office of the JAG and the CF benefit from the disciplinary knowledge and experience of senior ranking Non-Commissioned Members.

## *Organization/Establishment Data*

2. Position: AJAG CPO1/CWO
Position number: To be assigned
Organisation: AJAG
Rank: CPO1/CWO
MOC: Any
Security Clearance: Level 2
Qualifications: DP 5, POCT and appropriate Element.
Skills/Knowledge:

- Detailed knowledge of JAG and (area/formation) organization
- Detailed knowledge of NCM Professional Development
- Detailed knowledge of ceremonial and dress regulations
- Detailed knowledge of discipline/military justice regulations
- Knowledge of the Law of Armed Conflict
- Excellent communication skills
- Knowledge of the administration of military justice and military law
- Knowledge of administration and computer skills
- Knowledge of Orders and Regulations.

## *Role*

3. The role of the AJAG CPO1/CWO is to act as an adviser to the AJAG/DJA in support of the JAG's statutory role as the superintendent of the administration of military justice system and as legal adviser to the Governor General, the Minister, the Department and the Canadian Forces in matters relating to military law. The AJAG CPO1/CWO represents the interests of all AJAG/DJA personnel and promotes excellence, professionalism and teamwork. The AJAG relies on the AJAG CPO1/CWO to provide a broader perspective regarding the application of the Code of Service Discipline (CSD) within the CF. The AJAG CPO1/CWO is under the command of the unit, formation or command that owns the position and under the operational control of the AJAG/DJA for the performance of his/her duties.

## *Accountabilities*

4. The AJAG CPO1/CWO is accountable to the AJAG for the following:
   a. assisting the AJAG in the administration of Code of Service Discipline (CSD);
   b. assisting the AJAG in the dissemination of the Law of Armed Conflict;
   c. advising the AJAG on issues of morale within the Office;
   d. providing guidance to the AJAG on matters of training, dress, drill, discipline, and leadership issues;
   e. promoting military professional development within the office;
   f. assisting legal officers on visits and inspections as required;
   g. liaising with the Area/Formation/Base/Wing/Unit CPO1/CWOs, on matters pertaining to the office of the AJAG;
   h. providing feedback to the AJAG on the application of CSD, the provision of military legal services, training in respect of military law, and issues of discipline and morale within the region on behalf of the supported units;
   i. maintaining contact with supported units to keep them informed on the application of CSD, operational law and training issues on behalf of the AJAG;

j. maintaining contact with other AJAG CPO1/CWOs on the effect of discipline and application of the CSD;

k. liaising with JAG CWO regarding issues concerning AJAG CPO1/CWO related activities;

l. participating in appropriate Area/Formation/Base/Wing CPO1/CWO's Working group;

m. performing additional duties as required by the AJAG;

n. exercising a high level of leadership;

o. promoting teamwork within the immediate work unit and within the Office of the AJAG;

p. promoting the ethics and values of the military justice system;

q. acting as the AJAG representative to the NCM community;

r. maintaining awareness of current policies and issues in order to provide guidance on NCM matters; and

s. working effectively as a team member and ensuring efforts are aligned with the JAG/AJAG mission, vision, directives and policies.

### *Specific Military Justice Duties*

5. In addition to the duties above the following specific military justice duties are assigned:

   a. assisting charge-laying authorities to ensure proposed charges are drafted in accordance with regulations and contain all information required;

   b. conducting the initial monthly review of Record of Disciplinary Proceedings in accordance with QR&O 107.15;

   c. assisting units in the set-up of Courts Martial;

   d. assisting the point of contact in the preparation for Presiding Officer Certification Training;

   e. reviewing General Occurrence Reports/Military Police Investigation Reports;

   f. maintaining a register for Unit Delegated Officers, Custody Review Officers and Charge Laying Authorities;

   g. assessing and reporting on the efficiency of unit organizations when requested, with respect to compliance with disciplinary and administrative procedures, e.g. the maintenance of a Unit Registry of Disciplinary Proceedings, and compliance to CF policy;

h. maintaining liaison with the regional Provost Marshal office; and

i. assist the national CF monitoring authority with respect to the implementation of punishments imposed at courts martial.

### *Legal Branch Duties*

6. The AJAG CPO1/CWO shall participate in the following activities:

   a. JAG CWO Workshop;

   b. Seminars, Workshops and Professional Development Sessions that pertain to the duty of the JAG/AJAG/DJA as superintendent of the Military Justice System;

   c. Seminars, Workshops and Professional Development Sessions that pertain to the NCM/MOC PD system;

   d. JAG/AJAG Annual Workshops; and

   e. Various committees or meetings as a subject matter expert when required by the AJAG.

### *Resources*

7. The following resources are available:

   a. Staff: access to all members of the Office of the JAG and AJAG;

   b. Budget: as allocated by the AJAG; and

   c. Equipment: standard workstation and access to printers, classified (subject to security clearance level) and unclassified fax machines and Information Technology (IT) equipment and other required office equipment.

### *Performance Evaluation Reports (PER)/ Career Progression*

8. Section 4A of the PER is completed by the AJAG, Section 4B is completed by the AJAG in consultation with the CPO1/CWO chain of command. The appropriate officer in the CPO1/CWO chain of command who is best able to make appropriate recommendations in respect of senior appointment positions completes section 5. Honours and Awards should also be managed through the CPO1/CWO chain of command.

## Conclusion

9. These terms of accountability will assist all members of the Office of the JAG and the CF in understanding the important role and function of the CPO1/CWO. Indeed, the AJAG CPO1/CWO serves as a vital contact between the AJAG/DJA, the chain of command and non-commissioned members in respect of the administration of military discipline. The position of AJAG CPO1/CWO will contribute to the effective and efficient functioning of the Office of the JAG and the military justice system.

*(original signed by)*
**Jerry S.T. Pitzul, Q.C.**
MGen
JAG
992-3019/996-8470

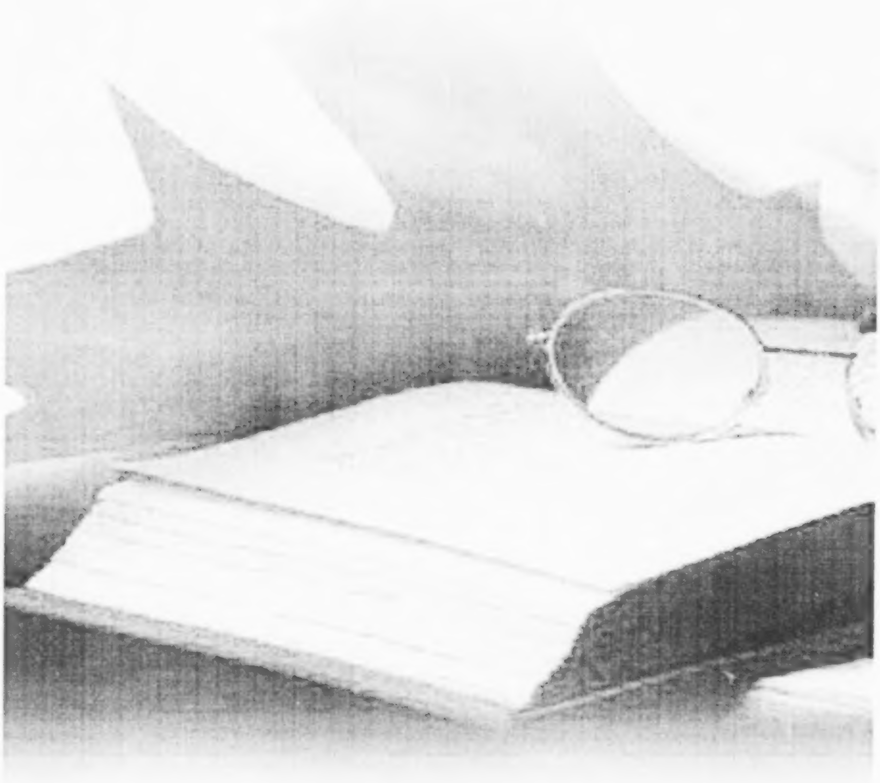
**Distribution List**

All Legal Officers (Regular and Reserve)

All Civilian and Military Members

# ANNEX I

## Annual Report of the Director of Defence Counsel Services for the period of 1 April 2004 to 31 March 2005



# ANNEX I

## Annual Report of the Director of Defence Counsel Services

*Prepared by Lieutenant-Colonel Jean-Marie Dugas*

### INTRODUCTION

1. This is the sixth annual report of the Director of Defence Counsel Services (DDCS) presented to the Judge Advocate General (JAG) under whose general direction I perform my duties. The format of this document conforms to *Queen's Regulations and Orders for the Canadian Forces* (QR&O) article 101.20. This report, my second as Director, covers the period from 1 April 2004 to 31 March 2005 and contains:
   - An overview of the DCS organization;
   - A review of DCS duties and responsibilities;
   - A review of the relationships between the Director, the staff and counsel of DCS, the Judge Advocate General (JAG) and the chain of command;
   - An overview of the services provided during the reporting period; and
   - DDCS and DCS general activities.

2. While this analysis of the activities of the past year is constructive, it is nonetheless critical in areas that we consider contentious, including the relationship with the JAG organisation, the budget situation, the actions of the chain of command in administrative and disciplinary matters towards military members and other pertinent matters to our activities.

## DCS ORGANIZATION

3. DCS is constantly in motion. In August, a military lawyer filled a position, which had previously remained vacant for two years completing the personnel list of Regular Force positions. A lawyer who left in December was replaced in January but the experience lost leaves us with a temporary deficiency in our arsenal.

4. The Reserve Force personnel list remains unchanged. A suitable candidate, accepted by the military recruitment system was selected for the vacant position during the reference period. We have submitted our recommendation to the JAG that an offer be made.

5. The three civilian personnel positions are now permanently filled and dedicated to the DCS mission. The state of affairs is reflected in the positive comments we have received regarding the quality of the services and work that these employees provide.

## DUTIES AND RESPONSIBILITIES

6. As the recommendations of the *National Defence Act* Five-Year Review are still in progress, the duties and responsibilities of DCS remain unchanged. The principal services offered and provided to persons subject to the Code of Service Discipline during this reporting period were:

***Legal Counsel Services:***

➤ To detained persons:

- to persons held in custody, at hearings by a military judge under ss. 159(1) of the NDA to determine retention in custody [QR&O 101.20 (2) (e)].

➤ To accused persons:

- at courts martial [QR&O 101.20 (2) (f)];
- where there are reasonable grounds to believe that the accused person is unfit to stand trial, at hearings to determine fitness to stand trial [QR&O 101.20 (2) (b)]; and
- in cases where a finding of unfit to stand trial has been made, at hearings as to the sufficiency of admissible evidence to put the accused person on trial [QR&O 101.20 (3) (c)].

- To persons sentenced by court martial to detention or imprisonment, at hearings for:
  - release pending appeal [QR&O 101.20 (3) (b)];
  - review of undertakings for release pending appeal [QR&O 101.20 (3) (b) and 118.23];
  - cancellation of release pending appeal [QR&O 118.23];
- To the respondent (offender), at Court Martial Appeal Court or Supreme Court of Canada hearings where prosecution authorities appeal the legality of a finding or the severity of a sentence awarded by court martial [QR&O 101.20 (2) (g)].
- To a person on an appeal or an application for leave to appeal to the Court Martial Appeal Court or the Supreme Court of Canada, with the approval of the Appeal Committee [QR&O 101.20 (2) (h)].

***Advisory Services:***

- To persons arrested or detained in respect of a service offence pursuant to s. 10(b) of the *Canadian Charter of Rights and Freedoms* (the *Charter*), on a 24/7 basis [QR&O 101.20 (2) (a)].
- To assisting officers and accused persons with respect to the making of an election to be tried by court martial pursuant to QR&O 108.17 and 108.18 [QR&O 101.20 (2) (d)].
- To assisting officers or accused persons on matters of a general nature relating to summary trials [QR&O 101.20 (2) (c)].
- To persons subject of an investigation under the Code of Service Discipline, a summary investigation or a board of inquiry [QR&O 101.20 (2) (i)].

## RELATIONSHIP DCS/CHAIN OF COMMAND AND ACCUSED

7. The professional independence of the DDCS and DCS staff is annually the subject of commentary. In the military context comments by superior officers concerning actions of lawyers, in relation to ongoing files, have direct repercussions on those in the front lines. The role of defence counsel is often to oppose the Chain of Command. This state of affairs highlights the requirement to put in place a tangible independent structure for defence counsel.

8. The ability of defence counsel to freely and effectively fulfill the duties and responsibilities entrusted to them revolves around this notion of independence. They must be sheltered from any actual or potential influence from any and all internal sources. Experience has shown that little is required to impede confidence and reduce the scope of professional discretion required. That said, DCS lawyers have fully undertaken their duties and responsibilities to their clients, comprehensively and professionally defending their clients' positions.

9. Communication between DCS counsel and clients, on one hand, and assisting officers on the other, is normally achieved regardless of the rank or status of the latter. However, the accused's place of residence and the geographical location of his or her unit are factors, which may influence the professional relationship. The difficulty in contacting witnesses and local resources are further factors, which render the duty of representation particularly complex. DDCS meets with JAG on a regular basis for administrative matters and from time to time on the legal activities of DCS.

10. Pursuant to his authority under ss. 249(2) of the NDA, the JAG issued guidelines of general application, to military lawyers regarding the protection of privileged documents. The application of the guidelines to DCS lawyers is under discussion for two reasons: first, the inability of reservists to comply with the guidelines, as they do not have access to the prescribed electronic modes of communications; second, though the objective is laudable, application of the guidelines shall be the subject matter of further discussions with the JAG as our clients are individual accused persons rather than the department or the CF.

## PROFESSIONAL DEVELOPMENT

11. All DCS lawyers participated in the national professional development program in criminal law, "The Canadian Criminal Law Program" held in Halifax, in August 2004. Though the quality and pertinence of this program argue in favour of annual participation, budgetary constraints prevent it. Two other group activities also took place, the professional development of DCS lawyers and the annual JAG conference held in Ottawa,

in October 2004. On an individual basis, two lawyers participated in professional development activities of their respective Bar associations.

12. One civilian employee completed her Basic English language training and another completed a course on access to information and the protection of personal information.

## THE BUDGET

13. The DCS budget originates directly from the JAG. Budget management is difficult as the location, number and nature of cases is unpredictable. The defence has no control over its incoming business. Despite a notable increase in funds for reserve lawyers who were heavily relied upon this year, the room for manoeuvre within the budget is limited and certain activities have been deferred to the following fiscal year. The support of the JAG on this matter has been positive and unconditional.

14. The defence now assumes supplementary charges for the transcription of witnesses' statements, formerly assumed by Military Police and Prosecution at the time of disclosure. This is quite substantial and it can no longer be ignored in the budgetary process.

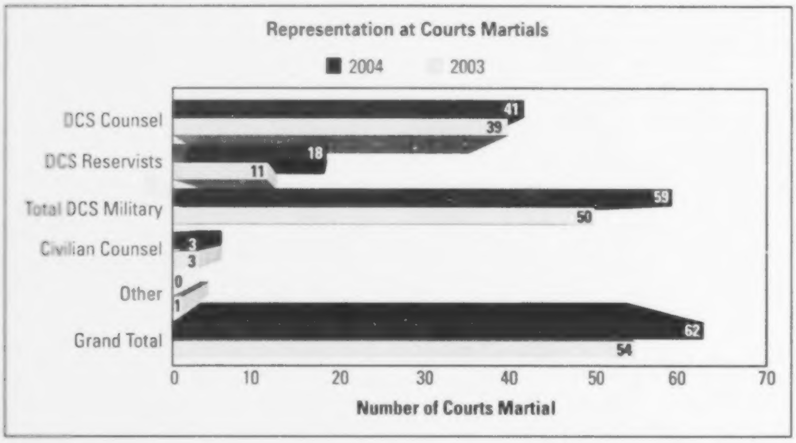
## SERVICES PROVIDED

### *Counsel Services*

➤ Courts martial

15. When facing a court martial, an accused person has the right to be represented by DCS counsel at public expense, may retain legal counsel at his or her own expense or may choose not to be represented.

16. During the reporting period, DCS was involved in 65 trials commenced before courts martial, three of which are ongoing and will be accounted for in the year(s) they are completed. Of the 62 accounted for in the following graph, three were conducted by civilian counsel, mandated by the DDCS in view of potential conflicts of interest between co-accuseds. The sources of representation in these courts martial were distributed as follows:

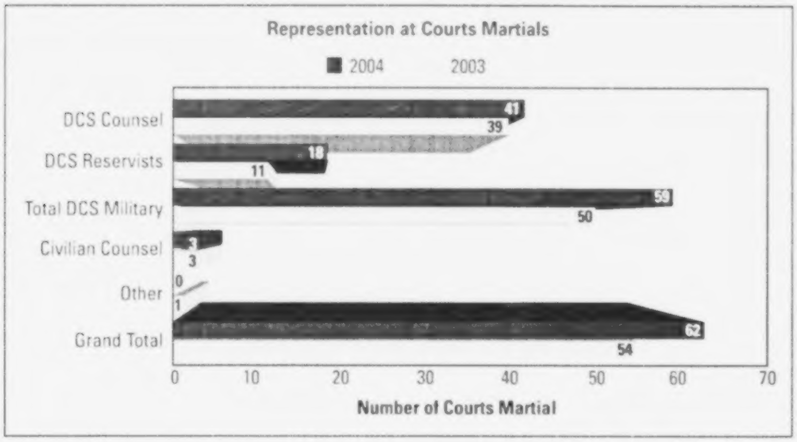


17. Pursuant to the authority granted to him under ss. 249.21(2) of the NDA, the Director of Defence Counsel Services may hire, at public expense, civilian counsel in cases where, having received a request for representation by DCS counsel, no member of the DCS office can represent the particular individual because of a conflict of interest. Reliance on civilian counsel poses two major difficulties: firstly, there are few who have suitable expertise; secondly, where an inexperienced counsel demonstrates interest, the DDCS must indirectly assume the costs of their professional development in military law, due to the time constraints of the file.

18. As demonstrated in the chart above, the involvement of reserve lawyers has been heavily solicited, as a direct result of the loss of experienced lawyer. Experience is a highly valued and essential resource necessary for the effective functioning of DCS.

➤ Appeals

19. During the reporting period, DCS recommended to the Appeal Committee that six requests for representation before the Court Martial Appeal Court pursuant to article 101.20(2)(h) of QR&O be approved. Half of the six requests were approved. The reason provided for the three rejections was lack of "professional merit". Two military members Appealed on their own by retaining civilian counsel at their expense. One of the two abandoned his claim due to insufficient funds.



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20. DCS counsel were involved in the following appeals during the reporting period:

- **Dixon** — The Appeal Committee rejected the member's request for DCS's representation on the grounds that the appeal had no professional merit. The CMAC later ordered DCS to represent the appellant, as this office had already prepared his Notice of Appeal and Memorandum of Fact and Law. The CMAC rejected the appeal as to finding, but allowed the appeal on sentence.
- **Raby** — The prosecution appealed the trial judge's finding that the Standing Court Martial had no jurisdiction to hear the case. The CMAC rejected the prosecution's appeal.
- **Lui** — The Appeal Committee granted DCS' request to represent the appellant on his appeal as to sentence. The CMAC allowed the appeal.

The fourth appeal by a member involving DCS will be heard in the next reporting period.

### *Advisory Services*

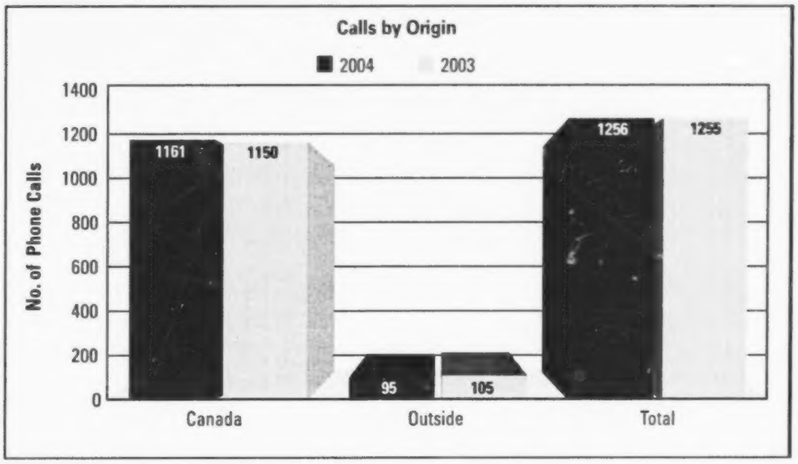
21. The advisory services provided by DCS counsel remain an important aspect of the overall operation of DCS. Indeed, with an increase in deployments, the situations giving rise to the need for legal advice are numerous and occur on a daily basis. Furthermore, this service contributes largely to the protection of CF members' fundamental rights.

22. These communications have exposed shortcomings in relation to the protection of and respect for these rights. Rapid intervention by DCS lawyers with the legal advisors of the military authorities in question, or with other directorates of the JAG, have enabled us at times to avoid further abuses or to correct the situation.

23. Bilingual services are freely available to all CF members and persons subject to the Code of Service Discipline, whether they are posted in Canada or abroad at all times without interruption. Telephone and electronic communications are ensured by DCS lawyers through a toll free number, widely disseminated throughout the CF, a national access number and email, which has become more and more frequent. Usage was distributed as follows:

- 1-800 access line to ensure access to legal advice upon arrest or detention; it is provided to military police and other CF authorities likely to be involved in investigations of a disciplinary or criminal nature.
- Standard direct telephone access, available to accuseds subject to the *Code of Service Discipline*, for advice in relation to an election between court martial and summary trial, or questions on other disciplinary matters, or all other matters authorized under the QR&O to all CF personnel.
- Email remains an avenue frequently used in initiating contact or obtaining information.

24. During the reporting period, DCS counsel handled a total of 1,256 calls. The calls ranged in duration from less than 10 minutes to more than an hour. This undertaking totalled nearly 500 hours, similar to the previous year. The origin of the calls is illustrated in the following graph:



25. We have also tabulated the official language used by the accused, illustrated in the following graph:

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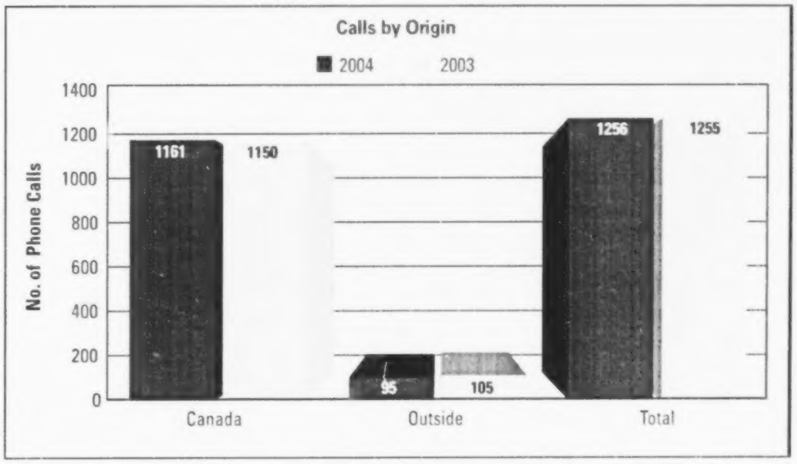

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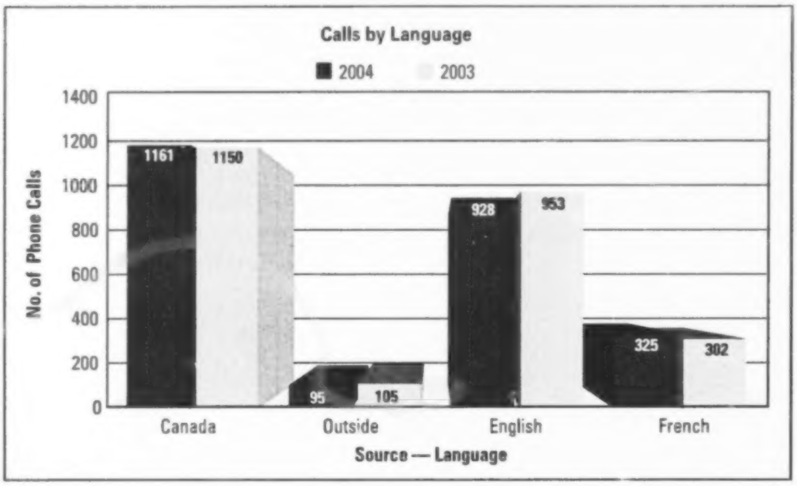
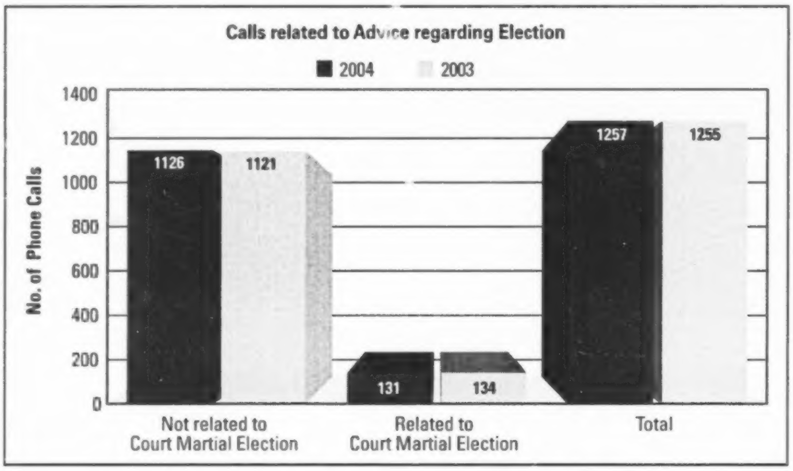
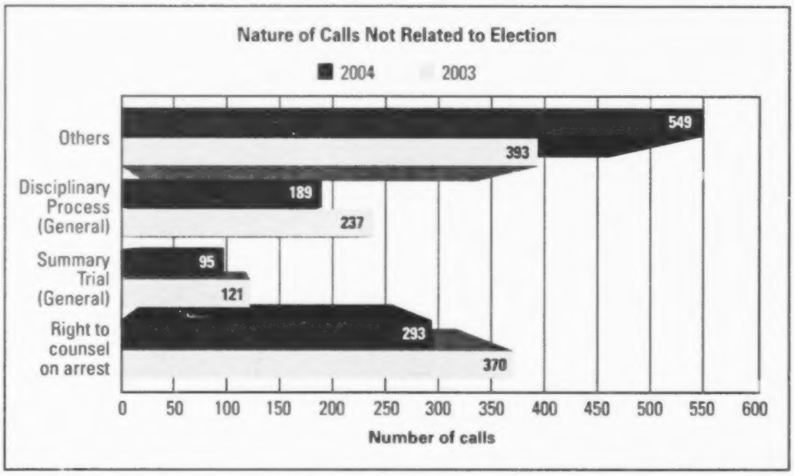


26. The graph below shows the proportion of calls related to advice regarding the election of an accused between court martial or summary trial to calls that were not related to this subject:

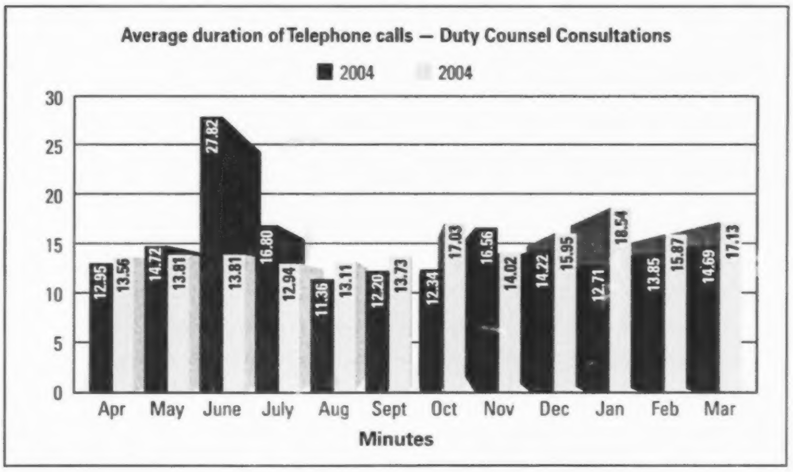


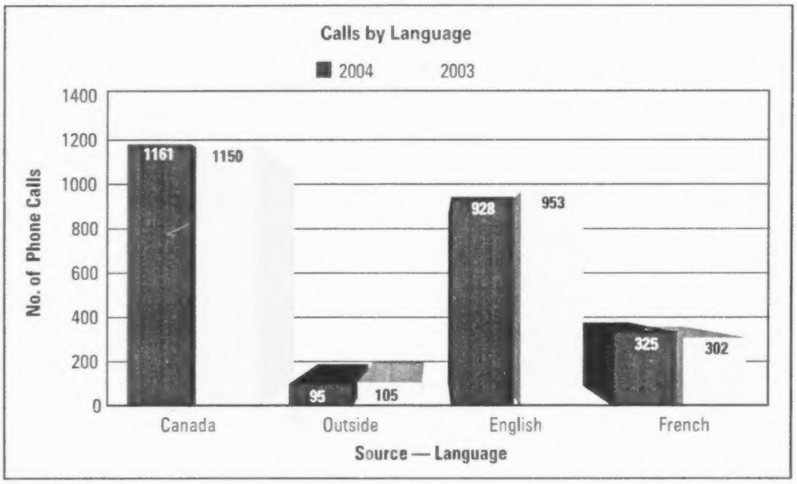
27. Similarly, this graph shows the nature of calls that were not related to the election of an accused between court martial or summary trial:



The *others* portion of the above graph refers to subjects such as the court martial process in general, redress of grievance and release from the CF. While DCS is not specifically mandated to advise on administrative matters, the duty counsel numbers which are widely distributed are also used for seeking advice on those subjects. In such situations, DCS counsel provide advice as to the mechanics of the process, but do not get involved in the merits of the matter.

28. Newly collected data added to the information compiled during the year, allows us to track the regularity and variations of telephone services provides to DCS's clients:





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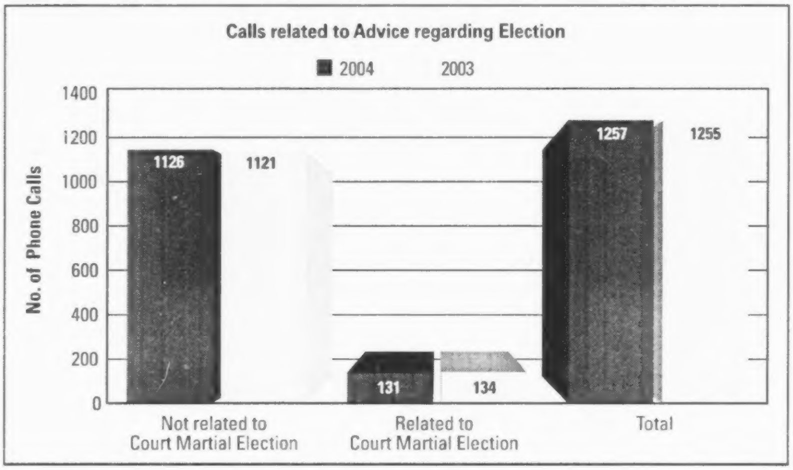

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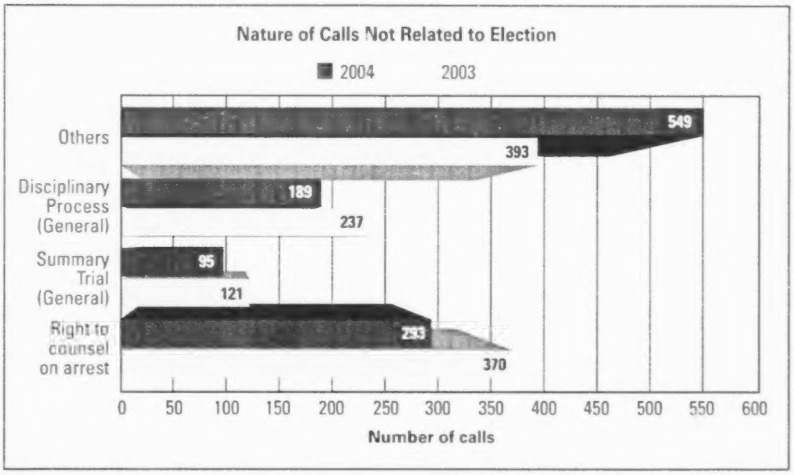
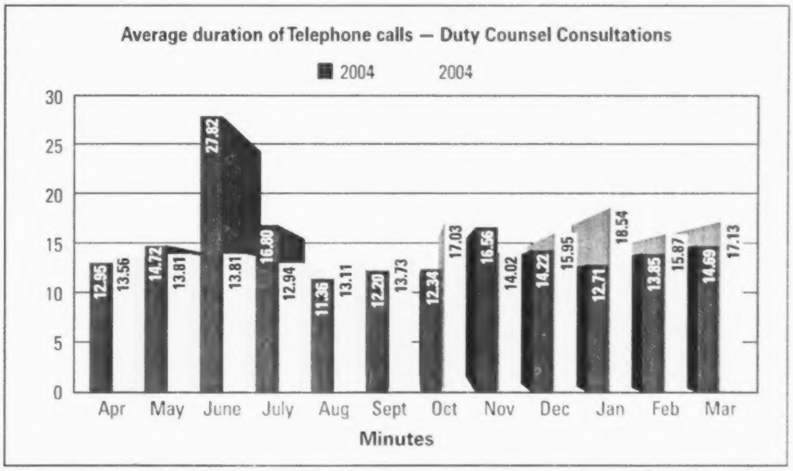


The *others* portion of the above graph refers to subjects such as the court martial process in general, redress of grievance and release from the CF. While DCS is not specifically mandated to advise on administrative matters, the duty counsel numbers which are widely distributed are also used for seeking advice on those subjects. In such situations, DCS counsel provide advice as to the mechanics of the process, but do not get involved in the merits of the matter.

28. Newly collected data added to the information compiled during the year, allows us to track the regularity and variations of telephone services provides to DCS's clients:



## GENERAL ACTIVITIES

29. DCS lawyers were twice involved in possible hearings to determine whether accused members should be retained in custody. The hearing, held before a military judge, determines whether the accused will be released with or without conditions pursuant to section 159 of the *NDA*. One accused was released by his unit following exchanges between defence counsel and the prosecution, eliminating the need for a hearing.

30. Two hearings were held pursuant to *QR&O* 101.20 (3)(c) in order to determine whether there was sufficient admissible evidence to order the accused to stand trial. They were related to events in Somalia where the former member was originally declared unfit to stand trial. The ex-member situation will be subject of a new hearing following the legislative changes required by the decision of the Supreme Court of Canada in a similar matter.

31. We are also participating, as much as possible, in the revision of and updates to the policies and regulations aiming at improving the administration of military justice and the *NDA*. DCS was approached on two occasions to submit its comments on proposed legislative changes following the Lamer report in the five year review of the NDA made public last year.

32. The establishment of a realistic judicial calendar that takes into consideration the realities of the defence is as pressing now as ever, as no progress has been made on the matter. The parties involved recognize that modifications are required but the solutions have not yet been found.

33. The final drafting of the regulations governing the legal representation of members accused of criminal offences before foreign courts, is late but on course. The draft DAOD originally submitted included a mathematical formula and spreadsheet calculating the amount an accused member would be required to reimburse the government for his or her legal fees. Test calculations suggest that there may be errors in the formula itself. We have therefore sought the assistance of DCBA in creating a viable formula. Work with the responsible JAG directorates and DND CF/LA in the drafting and adoption of the regulations has been postponed as we await a viable formula.

34. In the interim DDCS continues to administer the legal assistance funds allocated to military members accused abroad. In particular, following a change in counsel mandated by the local bar in the criminal file before the Australian court, no developments have been reported. The government has incurred no further costs. The administration of this file in accordance with Canadian Forces Administrative Order 111-2 — Employment of Civilian Defence Counsel in Foreign Criminal Court.

35. We note also that many accused members are released long before the conclusion of disciplinary proceedings and that some members are repatriated from missions abroad if they choose to exercise their right to be tried by Court Martial.

36. In addition we must sometimes deal with the diminished mental capacity of certain clients requiring special care and attention, as well as detailed medical analyses. It is also true that the release of accused members, without regard for the procedure or outcome of the military justice system, severely impedes the ability of DCS counsel to communicate with former members. Many accused persons restructure their activities to adjust to civilian life following their release and their contact information is frequently unknown. Release from the CF before the end of disciplinary proceedings occasionally jeopardizes the reintegration of the accused and his or her family into civilian life.

37. The Performance Evaluations process of DCS lawyers has been the subject of a brief discussion. The difference in rank structure between other components of the JAG on the one hand and defence lawyers on the other, is still intact causing the members affected concern. Without implying that direct mathematical parity is required, the fact remains that DCS lawyers are deprived of the benefit of having their Performance Evaluations reviewed by a full Colonel before they are submitted to the JAG, while this benefit is provided to all other JAG lawyers of equivalent ranks.

## CONCLUSION

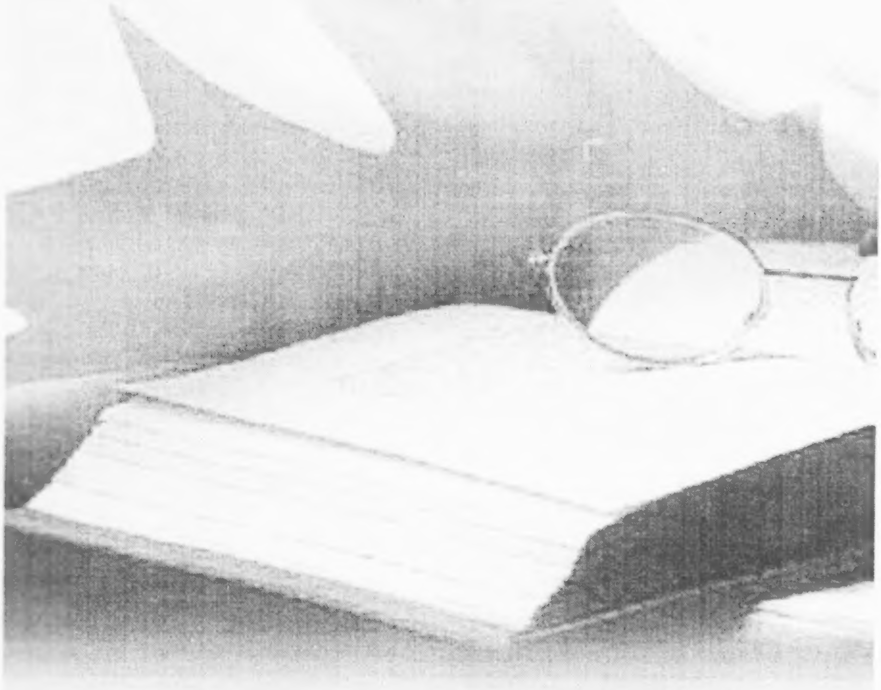
38. The length and volume of Courts Martial reveal a need to ensure broad financial latitude and flexibility. The JAG understands the unpredictability attached to this task and does not hesitate to support these additional needs.

39. Several files are settled following the Record of Disciplinary Proceedings prior to the charge being preferred for court martial. The human resources and finances required in such cases are nonetheless demanding of a significant amount of time and money when medical expertise is required.

40. Generally, Defence Counsel Services is achieving its mission's objectives.

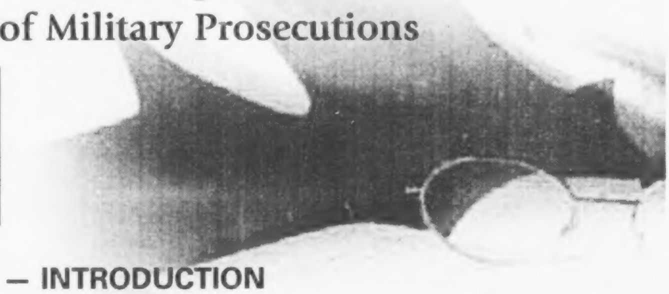
# ANNEX J

## Abridged Annual Report of the Director of Military Prosecutions for the period of 1 April 2004 to 31 March 2005



# ANNEX J

## Abridged Annual Report of the Director of Military Prosecutions



### SECTION 1 – INTRODUCTION

In accordance with the direction set out by the Governor in Council in the *Queen's Regulations and Orders for the Canadian Forces* (QR&O), the Director of Military Prosecutions (DMP) is required to report annually to the Judge Advocate General on the execution of her duties and functions.[1] This, the sixth such report submitted by a Director of Military Prosecutions — and the first submitted by the present Director[2] — covers the period from 1 April 2004 to 31 March 2005.[3]

This report will cover the following areas:

- The Director of Military Prosecutions and the Canadian Military Prosecution Service: Role, Organization, and Personnel
- Training, Communications and Policy Development
- Military Justice Proceedings: courts martial, appeals and other hearings

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[1] See QR&O articlez 110.11.

[2] Captain (N) M. Holly MacDougall was appointed Director of Military Prosecutions on 16 January 2005. She replaced Captain (N) Bill Reed, whose four-year appointment had expired. Captain (N) MacDougall's biography can be found on the website of the Director of Senior Appointments: www.forces.gc.ca/dsa/engraph/home_e.asp.

[3] A complete version of this report and previous DMP Annual Reports, along with copies of DMP Policy Directives and other information can be found at the CMPS website: www.forces.gc.ca/jag/military_justice/cmps/default_e.asp.

# SECTION 2 — THE DIRECTOR OF MILITARY PROSECUTIONS AND THE CANADIAN MILITARY PROSECUTION SERVICE: ROLE, ORGANIZATION, AND PERSONNEL

The Minister of National Defence appoints the DMP. While she acts under the general supervision of the Judge Advocate General (JAG), she exercises her duties and functions independently. The DMP is assisted in the fulfillment of her duties and functions by the Canadian Military Prosecution Service (CMPS), a team consisting of regular and reserve force legal officers who are appointed by DMP to act as military prosecutors, along with civilian paralegals and support staff. The service is organized regionally, and consists of:

- A headquarters at National Defence Headquarters in Ottawa staffed by the Director, Deputy Director, an appellate counsel and two staff prosecutors responsible for communications, training and policy development;
- Regional Military Prosecutors' (RMP) offices, each established for two regular force prosecutors, located at:
  - Halifax, Nova Scotia (Atlantic Region)
  - Valcartier, Quebec (Eastern Region)
  - Ottawa, Ontario (Central Region)
  - Edmonton, Alberta (Western Region)
- Reserve force prosecutors located individually across Canada.[4]

The primary duties of the DMP and the CMPS are related to the JAG's military justice role. They include:

- Providing legal advice to military police personnel assigned to the Canadian Forces National Investigation Service (CFNIS);
- Conducting post charge review of all charges referred for court martial and preferring charges for trial by court martial;
- Coordinating and conducting — in Canada or at deployed locations overseas — the prosecution of all charges tried by court martial;

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[4] An organization chart can be found at: www.forces.gc.ca/jag/military_justice/cmps/org_chart/CMPSOrgChart_e.pdf.

- Acting as appellate counsel for the Minister of National Defence on appeals;
- Representing the Canadian Forces at all custody review hearings conducted before a military judge; and
- Representing the Canadian Forces before other boards or tribunals dealing with specific cases where the Canadian Forces has an interest.

## SECTION 3 — TRAINING, COMMUNICATIONS AND POLICY DEVELOPMENT

All regular force military prosecutors are military legal officers who are posted to their positions for a limited period of time — usually three to five years. As such, the training that they receive must support both their current employment as prosecutors as well as their professional development as officers and military lawyers. The relative brevity of a military prosecutor's tour with CMPS requires a significant and ongoing organizational commitment to providing him or her with the formal training and practical experience necessary to develop the skills, knowledge and judgement essential in an effective prosecutor.

Given the small size of the CMPS, much of the required training is provided by organizations external to the Canadian Forces. During the present reporting period, CMPS prosecutors participated in conferences and continuing legal education programs organized by the Federation of Law Societies of Canada, the Canadian Bar Association and its provincial affiliates, the Alberta Department of Justice, the Nova Scotia Public Prosecution Service, the Ontario Crown Attorneys Association and various provincial law societies. These programs benefited the Canadian Forces not only through the knowledge imparted or skills developed but also through the professional bonds forged by individual military prosecutors with their colleagues from the provincial and federal prosecution services.

The capstone to CMPS training efforts is an annual workshop of military prosecutors. This year's workshop took place on 25 and 26 October 2004 at Ottawa, Ontario. It was attended by regular and reserve force prosecutors and by the civilian paralegal staff. The first day of the workshop consisted of presentations by, and discussions with, personnel from various Canadian Forces investigative and administrative organizations with whom prosecutors frequently interact. The second day was devoted to discussions of various current issues within CMPS and brief updates on the state of various areas of the law provided by reserve force prosecutors with expertise in those areas. The workshop was a success, providing an excellent forum for professional interaction among military prosecutors from across the country.

All military lawyers and military officers are required to undertake professional development activities consistent with their level of proficiency and experience. During the reporting period, all available military prosecutors attended the annual JAG continuing legal education workshop. Individual military prosecutors also took part in a variety of professional development activities ranging from the legal officer intermediate training program to the officer professional military education program to continuing language training. Finally, in order to maintain their readiness to deploy in support of JAG's mandate, CMPS prosecutors conducted individual military skills training such as weapons familiarization and first aid training.

DMP also provides support to the training mandates of other CF entities. During the present reporting period, this support included the mentoring and supervision by CMPS prosecutors of a number of junior military lawyers from the Office of the Judge Advocate General, who completed a portion of their "on the job training" program by assisting in the prosecution of charges at courts martial. Military prosecutors also provided presentations on legal matters to students at the Canadian Forces Military Police Academy and to investigators at regional detachments of the CFNIS.

A hardworking and highly motivated civilian support staff is an integral part of the CMPS team and provides a most important service in the carrying out of the prosecutorial function. As a result, significant efforts are also made to provide these individuals with training and experiences that will enhance their value to CMPS and to DND/CF. During this reporting period, individual CMPS civilian staff members undertook a variety of such activities. In particular, the appeals paralegal undertook a public service work experience assignment to the registries of the federal courts, the legal assistant in the RMP Western office completed a paralegal education program that was partially sponsored by a Department of National Defence scholarship and the legal assistant from the RMP East office deployed to Afghanistan for a six month tour with the Canadian Forces Personnel Support Agency.

Given the geographic dispersal of military prosecutors across Canada, effective communication is vitally important to the operations of the CMPS. For practical and fiscal reasons, the bulk of internal communication takes place via telephone and electronic mail. To ensure that prosecutors remain aware of the progress of individual disciplinary files, DMP updates and distributes several different internal reports on a weekly basis. DMP also convenes regular conference calls among the regular force prosecutors to provide direction and discuss matters of common interest. Following the completion of each court martial the trial prosecutor prepares a synopsis of the case for internal distribution within CMPS.

In order to promote transparency and confidence in the military justice system, among members of the Canadian Forces and of the Canadian public, DMP maintains an internet website. The site contains information regarding the key roles and activities of military prosecutors, along with copies of all JAG General Guidelines and Instructions to the DMP and DMP Policy Directives.

CMPS Prosecutors also play a role in the development of criminal prosecution policy and standards. The DMP continues to play a strong role in such efforts through her participation on a committee made up of the heads of all federal, provincial and territorial prosecution services. CMPS prosecutors act as her representatives on various sub-committees formed under the auspices of the main committee.

## SECTION 4 — MILITARY JUSTICE PROCEEDINGS

The nature of the operational tasks entrusted to the Canadian Forces requires the creation and maintenance of a high degree of discipline among CF members. Parliament and the courts have long recognized the importance of a separate Code of Service Discipline to govern the conduct of individual soldiers, sailors and air force personnel and prescribes punishment for disciplinary breaches. The Code of Service Discipline also creates a structure of military tribunals as the ultimate means of enforcing discipline. Among these tribunals are the courts martial.

During the present reporting period, CMPS prosecutors represented the interest of the Canadian Forces in a number of different types of judicial proceedings related to the military justice system. These proceedings included courts martial, appeals from courts martial, reviews of pre-trial custody and mental health review board hearings.

### *Courts Martial*

During the present reporting period, the DMP received 98 applications for disposal of a charge or charges from various referral authorities. This number is roughly consistent with the numbers of applications received throughout the history of the CMPS.

Following review by individual military prosecutors, charges were preferred to court martial in respect of 49 applications. A decision to not prefer any charges was made in respect of 21 applications because the admissible evidence was not sufficient to provide a reasonable prospect of conviction. Four applications were referred for disposal by an officer with jurisdiction to try the accused person by summary trial. No decision as to disposal has been made in respect of the remaining 24 applications. These figures are roughly proportionate to those from previous years.

All of the 64 courts martial held during the reporting period were Standing Courts Martial, composed of a military judge sitting alone as both the trier of fact and the trier of law.

### *Appeals*

During the present reporting period, appellate counsel appointed by DMP represented the Canadian Forces in 12 appeals. A member of the Canadian Forces who was convicted and sentenced by a court martial brought nine of these appeals. Her Majesty brought the remaining three appeals. Two of the appeals were abandoned — one by the appellant CF member and the other by the Crown. Oral hearings were held and the Court Martial Appeal Court (CMAC) rendered decisions in respect of five appeals. Oral hearings have not yet been held for the remaining five appeals.

### *Other Proceedings*

Military judges are required to review orders made to retain a CF member in service custody. DMP is mandated to represent the interest of the Canadian Forces at such hearings. During the present reporting period, CMPS prosecutors appeared at two custody review hearings. In both cases the person in custody was released upon giving an undertaking to comply with certain conditions set by the military judge.

Also during the present reporting period, CMPS prosecutors represented the Canadian Forces in two proceedings involving Ex-Master Corporal Clayton Matchee. At the first, an inquiry by court martial, the military prosecutors established to the satisfaction of a military judge that there remains sufficient evidence against the accused to continue to proceed to a trial of the charges should he become mentally fit to stand trial. At the second, a military prosecutor represented the CF at a Provincial Mental Health Review Board hearing in Saskatchewan that determined that the accused remained unfit to stand trial.

## CONCLUSION – DMP COMMENTS

Since assuming the appointment of Director of Military Prosecutions on 16 January 2005, I have been impressed by the maturity and knowledge demonstrated by the CMPS team of legal officers and civilians I now have the privilege of leading. It is obvious that the focus placed on the continuous improvement of core competencies of military prosecutors by previous DMPs, as well as the hard work and dedication of the prosecutors themselves, has paid large dividends. However, in a relatively new organization that experiences significant personnel changes on a regular basis, the challenge of maintaining and improving professional expertise as a military prosecutor is not insignificant. Formal training through participation in continuing legal education courses and seminars offered by various sources, including Canadian prosecution services, provincial bar associations, the Federation of Law Societies of Canada and the annual CMPS workshop is, of course, fundamental to this process. Nevertheless, formal training alone cannot produce skilled military prosecutors who demonstrate maturity and common sense. Practical experience is an equally important component of the development process. Unlike our civilian counterparts who may have litigated hundreds of cases in their careers as prosecutors, before various levels of courts, our military prosecutors have more limited opportunities to acquire this level of practical experience. This is not only because of the relatively small number of courts each year in the Canadian Forces in comparison to the federal and provincial justice systems, but also because of the requirement for legal officers to serve as operational and military administrative legal advisors during their careers with JAG. Extra-jurisdictional training in the form of secondment of military prosecutors on a short to medium term basis to other prosecution services is one method of enhancing the experience level of military prosecutors. This method has been successfully used in the past within CMPS, on an ad hoc and limited basis[5]. In 2005–06, DMP will explore the possibility of implementing a more formalized program of extra-jurisdictional training for legal officers within CMPS. This, of course, will be dependant on availability of resources, as well as training opportunities.

DMP remains firmly committed to participating in the development of criminal prosecution policy and standards and to enhancing the awareness of the Canadian military justice system among its civilian counterparts, both nationally and internationally. One of the most effective and constructive forums for meeting these objectives has been the Federal/Provincial/Territorial Heads of Prosecution Committee. DMP's membership on this committee and participation in the committee's meetings will continue to be a priority. Another ideal forum for communicating the substantive advances in independence, transparency and fundamental fairness of the Canadian military justice system is the CMPS institutional membership in the International Association of Prosecutors (IAP). Recently, at the last annual convention in Korea, the IAP had occasion to consider the role of military prosecution services in advancing the rule of law and the relationship of military prosecutors to their civilian counterparts. The CMPS representative at the convention participated in this important discussion and took the opportunity to explain aspects of the CMPS and the Canadian Forces military justice system and some of the safeguards built into the system to ensure compliance with the rule of law and respect for individual rights. DMP will continue to raise the profile of the Canadian military justice system in a manner that is fully consistent with Canada's broader leadership role in the areas of respect of the rule of law and human rights by maintaining and enhancing CMPS support and participation in IAP initiatives.

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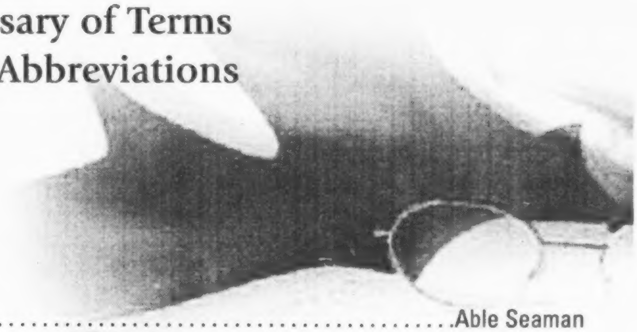
[5] For, example, in anticipation of CMPS' establishment, a military prosecutor was seconded to the Federal Department of Justice in Yellowknife between May–July 1999 to obtain prosecution experience within that jurisdiction. In August–September 2001, a military prosecutor was assigned to the counsel office for the city of Quebec for a period of 6 weeks.

# Glossary of Terms and Abbreviations



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|---|---|
| AB | Able Seaman |
| ADM(PER) | Assistant Deputy Minister (Personnel) |
| AJAG | Assistant Judge Advocate General |
| CA | Court of Appeal |
| Capt | Captain |
| CBA | Canadian Bar Association |
| CCC | Criminal Code of Canada |
| CDS | Chief of the Defence Staff |
| C.D.S.A. | Controlled Drugs and Substances Act |
| CF | Canadian Forces |
| CFJOG | Canadian Forces Joint Operations Group |
| CFNIS | Canadian Forces National Investigation Service |
| CFOO | Canadian Forces Organizational Order |
| CLE | Continuing Legal Education |
| CM | Court Martial |
| CMAC | Court Martial Appeal Court of Canada |
| CMPS | Canadian Military Prosecution Service |
| CO | Commanding Officer |
| COS | Chief of Staff |
| Cpl | Corporal |
| CPO1 | Chief Petty Officer 1st Class |
| CRS | Chief of Review Services |
| CSD | Code of Service Discipline |
| CWO | Chief Warrant Officer |
| DAOD | Defence Administrative Orders and Directives |

| | |
|---|---|
| DCBA | Director Compensation and Benefits Administration |
| DCS | Defence Counsel Services |
| DDCS | Director of Defence Counsel Services |
| DJA | Deputy Judge Advocate |
| DJAG | Deputy Judge Advocate General |
| DJAG/COS | Deputy Judge Advocate General/Chief of Staff |
| DJAG/MJ&AL | Deputy Judge Advocate General/ Military Justice and Administrative Law |
| DJAG/Ops | Deputy Judge Advocate General/Operations |
| DJAG/Reg Svcs | Deputy Judge Advocate General/Regional Services |
| DLaw/AL | Directorate of Law/Administrative Law |
| DLaw/HR | Directorate of Law/Human Resources |
| DLaw/I&IO | Directorate of Law/Intelligence and Information Operations |
| DLaw/MJP&R | Directorate of Law/Military Justice Policy and Research |
| DMP | Director of Military Prosecutions |
| D.N.A. | Deoxyribonucleic acid |
| DND | Department of National Defence |
| DND/CF LA | Department of National Defence/Canadian Forces Legal Advisor |
| HTML | Hypertext Mark-up Language |
| IAW | In Accordance With |
| IT | Information Technology |
| JAG | Judge Advocate General |
| JIRT | JAG Internal Review Team |
| LL.M | Masters of Laws |
| LCol | Lieutenant-Colonel |
| Lt(N) | Lieutenant (Navy) |
| LS | Leading Seaman |
| MCpl | Master Corporal |
| MJCC | Military Judges Compensation Committee |
| MJSC | Military Judges Selection Committee |
| MND | Minister of National Defence |
| MOO | Ministerial Organizational Order |
| MOZART | Military Occupational Structure Analysis Redesign and Tailoring |
| MP | Military Police |
| MWO | Master Warrant Officer |
| NCM | Non-commissioned member |
| NDA | National Defence Act |
| NDHQ | National Defence Headquarters |
| NDSI | National Defence Sensitive Information |
| NGO | Non Governmental Organization |
| OCdt | Officer Cadet |

| | |
|---|---|
| OJT | On-the-job Training |
| OPME | Officer Professional Military Education |
| OS | Ordinary Seaman |
| PDF | Portable Document Format |
| PER | Performance Evaluation Report |
| PG | Post Graduate |
| PO2 | Petty Officer 2nd Class |
| POCT | Presiding Officer Certification Training |
| PORT | Presiding Officer Re-certification Training |
| Pte | Private |
| Q.C. | Queen's Counsel (Conseil de la reine) |
| QR&O | Queen's Regulations and Orders for the Canadian Forces |
| RDP | Record of Disciplinary Proceedings |
| RMC | Royal Military College |
| RMP | Regional Military Prosecutor |
| SCC | Supreme Court of Canada |
| SCR | Supreme Court Reports |
| Sgt | Sergeant |
| Stn | Station |
| Tpr | Trooper |
| VCDS | Vice Chief of the Defence Staff |
| WO | Warrant Officer |
| 2Lt | Second Lieutenant |